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An exchange calls attention to a novel decision of the New York Supreme Court with respect to the rights of citizens, particularly with regard to their immunity from arrest by police officers, who are acting under no more definite authority or motive than that of suspicion. The case is Snead v. Bonnoil. It appeared that while the plaintiff was emerging from a pawn shop with a bag filled with jewelry and silverware, two policemen, one of whom was the defendant, arrested him, saying in explanation of their conduct, that they wished to ascertain what he had in the bag. In reply he said that the property, as he could prove, belonged to him. He was, nevertheless, taken to the station-house and locked up. When a search was made of his person it was found that he had a loaded revolver. After having him remanded for twenty-four hours in order to find out whether the charge of being a "suspicious person," which is a misdemeanor, could be sustained, the officers decided to change this charge to the carrying of concealed weapons, which is a felony. Although the appellate court, to which the case was carried, thought that the circumstances might justify the belief that Mr. Snead was a suspicious person, he could not be held on a charge different from the one for which he had been arrested. "There can be no general right," it said, "to arrest a citizen for an undisclosed offense. The police officer cannot arrest a man for one cause, and when that is exploded, justify for another. Such a doctrine would be an incentive to the loosest practices on the part of police officers, and a dangerous extension of their sufficiently great powers." Again the court said concerning the detention of Mr. Snead without bail: "Thus the officers utilized the felony charge to detain the plaintiff for at least twenty-four hours beyond the time he was entitled to his discharge upon bail upon the misdemeanor charge. Beyond peradventure the police officer was liable for every hour he detained the plaintiff after he and his associate officer had secured the remand from the magistrate for a reason which could not have availed them had they then charged the plaintiff with the misdemeanor."

The legislature of Rhode Island recently enacted a statute having for its object the suppression of what is known in commercial circles as "trading stamps," whereby it was made unlawful for any person or corporation to sell, give, or distribute any stamp, coupon, or other device which shall entitle the purchaser of property to demand or receive from any person or corporation other than the vendor, any article of merchandise other than that actually sold to said purchaser, and for any person or corporation other than the vendor, to deliver to any person any article of merchandise other than that actually sold upon presentation of any such stamp, coupon or other device; provided, however, that this act shall not affect any existing contract. The Supreme Court of Rhode Island, in the case of State v. Dalton, 46 Atl. Rep. 234, considered the validity of the act holding that, whatever the powers of a legislature to prohibit the "trading stamps" system in proper cases may be, the statute under consideration was so general in its terms as to amount to an infringement of constitutional liberty. The court relies to a material extent upon the decision of the New York Court of Appeals in People v. Gilson, 109 N. Y. 389. In all cases of this character the turning point is whether there is a lottery—that is, an essential element of chance—or whether the additional benefit to a purchaser is in the nature of a "chromo," or gift. The Rhode Island court cites and analyzes a large number of previous authorities bearing upon this general question. The substance of the decision may be better understood by quoting the following from the opinion of the court: "This inalienable right is trenched upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided, always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest. Now, it was certainly within the constitutional right of the defendant in this case to sell tobacco—it being presumed, of course, that he had obtained the necessary authority to deal in that article; and, as an inducement to people to

trade with him, it was also his right to give to each purchaser of a certain quantity of tobacco, either directly or through a third person, some other designated article of value, by way of premium. The statute in question, however, steps in to prevent him from adopting such a course to procure trade, and from it to secure an income and livelihood; and he is thus restrained in the free enjoyment of his faculties to which he is constitutionally entitled, unless such restraint is necessary for the common welfare, in one of the ways heretofore mentioned, and we cannot see that it is. In other words, the statute says that A shall not sell to B a barrel of flour, and, in connection with and as a part of the contract of sale, give to B a coupon which will entitle him to receive from C a pound of tea, a pitcher, a lamp, a clock, a door mat, or some other specified article of merchandise. If the act had prohibited the giving away of any stamp or device in connection with the sale of an article, which would entitle the holder to receive, either directly from the vendor, or indirectly through another person, some indefinite and undescribed article, the nature and value of which were unknown to the purchaser, there would then be introduced into the prohibited transaction enough of the element of uncertainty and chance to condemn it as being in the nature of a lottery."

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATION — VALIDITY OF ORDINANCE — UNREASONABLE INTERFERENCE WITH LIBERTY.—In Gastenan v. Commonwealth, 56 S. W. Rep. 705, decided by the Court of Appeals of Kentucky, it was held that a city ordinance declaring that it shall be unlawful for any woman to go in and out of a building where a saloon is kept for the sale of liquor, or "to frequent, loaf or stand around said building within fifty feet thereof," and providing for the punishment of any saloonkeeper who shall permit a violation of that provision of the ordinance, is void, as being an unreasonable interference with individual liberty.

CORPORATION—STOCKHOLDERS — INSPECTION OF BOOKS — INJUNCTION.—It is held by the Supreme Court of Ohio, in Cincinnati Volksblatt Co. v. Hoffmeister, 56 N. E. Rep. 1033, that injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by section 3254, Rev. St., to inspect the books and records of the corporation; that the right to inspect does not depend upon the motive or purpose of the stockholder in demanding such inspection, and a petition which shows that the plaintiff is a stockholder, that he has requested the defendant to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action; and that as incident to such right is the right to have such inspection by a proper agent, and to take copies from such books and records.

GARNISHMENT—SITUS OF DEBT.—In National Fire Ins. Co. v. Wing, 60 Pac. Rep. 720, decided by the Supreme Court of Arizona, it appeared that plaintiff, a resident of Arizona, sued in that territory on an insurance policy; and defendant pleaded that, after receipt of plaintiff's proof of loss, plaintiff had been sued in California by creditors there,—service being had by publication,—and that funds for the payment of plaintiff's claim in the hands of defendant's general agent in California were garnished, and thereafter, under the garnishment proceedings, paid by defendant to plaintiff's creditors. It was held that as defendant's debt to plaintiff would sustain an action *in rem* against plaintiff, and as defendant had funds in California which plaintiff could have attached in an action on his policy in that State, the *situs* of the debt was there, for the purpose of garnishment, and defendant's payment under the garnishment proceedings was a defense to plaintiff's action.

TRADE-NAMES — SURNAMES — RIGHT TO USE ONE'S OWN NAME.—Two cases have recently been decided which illustrate the general doctrine that a person has the right to use his own name in his own business; that one cannot make a trademark of his name and so debar others having the same name from using it, although it be in the same business. In Harson v. Halkyard, 46 Atl. Rep. 271, decided in the Supreme Court of Rhode Island, it appeared that the principal point of resemblance between the signs, labels and advertisement of complainant and respondent was the prominence given to the name "Harson," which is the surname of complainant and one of the respondents. It further appeared that there was nothing in the respondent's advertisement, except the use of such name, which would deceive the public into buying the goods of respondents when they intended buying complainant's goods. It was held that the respondents would not be enjoined from using such advertising matter, as the respondent in question had the right to so use his own surname. In National Starch Mfg. Co. v. Duryea, 101 Fed. Rep. 117, decided by the United States Circuit Court of Appeals, Second Circuit, it appeared that one Duryea was for many years the president and a stockholder in the Glen Cove Manufacturing Company, which made and sold starch in packages having thereon the name

"Duryea's Starch," in prominent letters, and also a picture of the manufacturing buildings, and the name of the company. After the starch had been sold for many years, and had become identified with the company, the latter sold its business, trade-marks, and good will to another corporation, which continued the use of the package containing the name and picture, with its own name as manufacturer; Duryea agreeing not to go into the starch business for five years. At the expiration of this time he furnished capital to his sons, who formed a partnership with others, and procured other starch to be made for them, and sold it as "Starch Prepared by Duryea & Co.," but used strikingly different labels and packages. Their starch was in fact prepared in accordance with directions given by them, or Duryea, Sr., who subsequently purchased the assets of the firm, and continued the business. It was held that this was a proper use by Duryea and his sons of their own name, and could not be enjoined.

EVIDENCE—USAGE AND CUSTOM—SALE—"DRY GOODS."—The Supreme Court of Iowa hold, in Wood v. Allen, 82 N. W. Rep. 451, that it is error to exclude evidence that the term "dry goods," used in a written contract, bears a meaning, according to the usage of the locality, under which notions, clothing, hats and caps are excluded, since such evidence does not contradict the terms of the contract, but merely applies them to its subject-matter; and the error is not cured by an instruction that "dry goods" means, in a commercial sense, such fabrics as are "made by weaving." The court calls attention to the fact that evidence has been admitted to explain the words "fur," Astor v. Insurance Co., 7 Cow. 202; "roots," Coit v. Insurance Co., 7 Johns. 385; "barrels," Miller v. Stevens, 100 Mass. 518; "C. O. D.," Collender v. Dinsmore, 55 N. Y. 200; "screened coal," Manufacturing Co. v. McKee's Admr., 77 Pa. St. 170; "1,000 shingles," Soutier v. Kellerman, 18 Mo. 509; "thousand feet," Brown v. Brooks, 25 Pa. St. 210; "fancy goods and Yankee notion store," Barnum v. Insurance Co., 97 N. Y. 188; "product," Stewart v. Smith, 28 Ill. 397; "outstanding accounts," McCulsky v. Klosterman, 20 Oreg. 108, 25 Pac. Rep. 366, 10 L. R. A. 785; "furniture and fixtures," Brody v. Chittenden, 106 Iowa, 524, 76 N. W. Rep. 1009; "top buggies with poles," Manufacturing Co. v. Randall, 62 Iowa, 245, 17 N. W. Rep. 507.

In the recent case of Everett v. Indiana Paper Co., 57 N. E. Rep. 281, decided by the Appellate Court of Indiana, it was held that a contract for the delivery of 53,000 pounds paper, on the basis of "37x48, 53 lbs. 500 sheets," is not so plain as to the manner of weighing the paper that there could be but one conclusion. It was, therefore, held that evidence of a custom or usage in the paper business, that an order for 53,000 paper, "37x48, 53 lbs. 500 sheets," means that the weight of wrapping necessary to safely transport it is to be included in the specified weight, is admissible to show what is meant by the terms used, and does not contradict the express terms of the contract. The court said in part: "Nor can it be said that such a usage is unreasonable, contrary to law, or opposed to public policy. In Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. Rep. 593, it is said: 'Parties who are engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business. Its usage may, therefore, in the absence of an agreement to the contrary, reasonably be supposed to have entered into and formed part of their contracts and understandings in relation to such business as ordinary incidents thereto. Railway Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Mooney v. Insurance Co., 138 Mass. 375, 52 Am. Rep. 277; Machine Co. v. Daggett, 135 Mass. 582; Fitzimmons v. Academy, 81 Mo. 37; Cooper v. Kane, 19 Wend. 386; Kelton v. Taylor, 11 Lea, 264, 47 Am. Rep. 284, 7 Cent. L. J. 383.' "

RECEIVER — JUDGMENT AGAINST INSOLVENT CORPORATION — POWER TO REOPEN.—It is held by the Supreme Court of Illinois, two of the members of the court dissenting, viz., the case of Peabody v. New England Waterworks Co., 56 N. E. Rep. 957, that the receiver of an insolvent corporation authorized by the corporation act to sue and to do all things necessary to close up its affairs, as commanded by decree of court, occupies such a relation that, for the protection of the corporation and its creditors, he may appear and move to reopen judgments against it obtained by fraud and collusion, and be allowed to defend, if their effect would be to diminish the estate which should properly come to him for distribution. The court says in part:

"The provisions of section 25 are not intended to limit the powers of a receiver appointed under the chancery practice, but to extend the powers of the court in the matter of the causes which shall be deemed sufficient to authorize the appointment of a receiver, and the causes for which the affairs of a corporation may be closed up. A receiver is to be regarded as the representative, not only of the corporation, having power of asserting its rights, taking its title and subject to its liabilities, but occupies a still broader position, for he represents not only the corporation, but also its creditors; and under his duties as the representative of the latter class he is invested with powers and may do acts that could not be done by a mere representative of the corporation. It is said in Gluck & B. Rec. p. 177: 'The receiver of an insolvent corporation, while, as a general rule, he is to be regarded as the representative of the corporation, asserting its rights, taking its title, and subject to its liabilities, in one respect occupies a broader position, and represents not only the corporation, but also the creditors; and when, in any proceeding, he occupies exclusively the latter *status*, he may do, and under some circumstances must do, many things which, if his

acts were strictly limited to those of a representative of a corporation, he could not do. * * * He may file exceptions to the report of a referee appointed to take proof of claims, and for that purpose represents not only the corporation, but he stands as a trustee of its funds for all creditors, and may intervene to see that no injustice is done to any one.'

"In Whittlesey v. Delaney, 73 N. Y. 571, it was held that, a corporation having become insolvent, its receiver, as the representative of creditors, has the capacity to make the objection that a judgment against the corporation by confession was not obtained in such a manner as to be binding upon the corporation. To the same effect is Stokes v. Pottery Co., 46 N. J. Law, 237.

"In Carbon Co. v. McMillin, 119 N. Y. 46, 23 N. E. Rep. 530, 7 L. R. A. 46, it was held: 'It is claimed that no action could have been maintained by the trustee representing the trust combination against the Brush Electric Light Company to recover the purchase price of the carbons, for the reason that the illegality of the combination would have constituted a good defense. Assuming this predicate, it is asserted that the receiver stands in the same position, and that his title is subject to the same infirmity, as that of the combination which he represents. Without considering the assumption upon which his proposition is based, it is a sufficient answer to the proposition asserted "that the receiver unites in himself the right of the trust combination and also the right of creditors, and that he may assert a claim as the representative of creditors which he might be unable to assert as a representative of the combination, merely." The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former may be asserted against the latter. But there is a recognized exception which permits the receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights. Assuming that the trustee could not have recovered of the Brush Electric Light Company for the reasons suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction which should deny to innocent creditors of the combination, or to the receiver, who represents them, the right to have the debt collected, and applied in satisfaction of their claims.' To the same effect are Moise v. Chapman, 24 Ga. 249, and Hamor v. Engineering Co. (C. C.), 84 Fed. Rep. 393. In the latter case it is said: 'The receivers, representing both the creditors and the defendant, have the right to assert any defense to which the creditors, in contradistinction to the defendant, are entitled.'

"In Insurance Co. v. Swigert, 135 Ill. 150, 25 N. E. Rep. 680, 12 L. R. A. 328, it was said (page 167, 135 Ill., page 685, 25 N. E. Rep. and page 333, 12 L. R. A.): 'We understand the rule to be that, where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it; and that for purposes of litigation he takes only the rights of the corporation such as could be asserted in its own name, and that upon that basis only can he litigate for the benefit of either shareholders or creditors.' The opinion in the last-mentioned case then proceeds to discuss the power of a receiver, and holds that, so far as the title of the property is concerned, the power of the receiver is solely and only a power with reference to the corporation. The opinion then further holds (page 177, 135 Ill. page 688, 25 N. E. Rep. and page 336, 12 L. R. A.): 'But, so far as his powers are derived from a statute, or from a lawful decree of court, and the powers do not involve rights which, at the time of his appointment, were vested in such owners, he is not merely their representative, but is the instrument of the law, and the agent of the court which appointed him. Such right and authority as the law and the court rightfully give him he possesses, and in respect to such right he is not circumscribed and limited by the right which was vested in and available to the owners.'

"In Knights v. Martin, 155 Ill. 486, 40 N. E. Rep. 358, the court said (page 489, 155 Ill., and page 358, 40 N. E. Rep.): 'This was a motion to quash an execution issued upon a judgment confessed in vacation, and to set aside the judgment. Shortly after the judgment was confessed, the judgment debtor executed to appellee a deed of assignment of all his property for the benefit of his creditors. The motion was made in the name of the judgment debtor and his assignee, but before decision the debtor formally withdrew the motion as to himself, and it was afterwards prosecuted by the assignee.' The motion was denied. The court then further say: 'Appellants contend that appellee was not a proper party to make this motion, which was made under section 65 of chapter 110 of the Revised Statutes. The assignee takes the same interest and title in the assigned estate that his assignor possessed, and his title will be subject to all the equities that existed in respect thereof in the hands of the assignor, and he may do whatever his assignor might have done in respect of the assigned property if no assignment had been made. * * * We are of the opinion that the relationship of the assignee to his assignor and to the assigned estate is such that he may be considered a proper party to make this motion, notwithstanding the rule that no one but a party to a judgment or execution can move to set aside a judgment or quash the execution.'

"The receiver in this case was appointed under the provisions of section 25 of the act with reference to corporations, which statute authorizes

him to close up the business of the corporation, and do all things necessary to that end, to sue in all courts, etc. The decree under which he was appointed directed: 'That any and all officers, agents, attorneys, servants, and employees of said defendant, and any and all parties having in their possession or under their control any of the property or assets of the defendants; immediately surrender all such property and assets to the receiver hereinbefore named, and that they, and each and all of them, refrain from in any manner intermeddling with said property, or withholding possession thereof from such receiver; and they, and each of them, are hereby enjoined from any and all attempts to withhold or conceal any of said property from said receiver, and from contracting any liabilities in the name or on behalf of said defendant Illinois corporation, or of using its name for any purpose or in any proceeding; and all parties having any claims against said defendant Illinois corporation are hereby directed to present the same in this proceeding for adjudication.' It is absolutely necessary, in closing up the business of a corporation, as provided by the foregoing provision of the statute, that there must not only be a collection of the debts owing to it, but there must be a determination as to the debts due from the corporation, before the court can equitably distribute the funds of the corporation in the payment of debts. In this case, having in view the proper distribution of the funds of the corporation, the court, by its decree, specifically directed that all persons should refrain from interfering with the property or withholding possession thereof from the receiver, and that the defendant and others should be 'enjoined from any and all attempts to withhold or conceal any of such property from said receiver, and from contracting any liabilities in the name or on behalf of said defendant, * * * or using its name for any purpose or in any proceeding.' The officers of this corporation, until this decree, were prevented from the execution of promissory notes, and from doing any act increasing the liability of this corporation, by which the assets in the hands of the receiver should be diminished or destroyed.

"The circumstances under which the promissory note for which this judgment was rendered was given are strongly indicative of fraud and collusion. The judgment is prejudicial to the estate in the hands of the receiver. By it the estate would be diminished, and the amount in the hands of the receiver for the payment of valid claims would be greatly lessened. One of the appellees is the chief stockholder in both of the corporations. As a stockholder in the corporation in whose favor a judgment was rendered, he becomes the chief beneficiary by that judgment, and through his action there is effected a change in the character of the estate coming to the hands of the receiver and for his own benefit. To hold that the receiver, in such a case, should not be permitted to appear and contest a judgment collusively entered into, would be denying him the power of properly closing out the business of the corporation, collecting its assets, and distributing the estate to those equitably entitled thereto. We are of opinion that, where there is fraud and collusion in obtaining judgments against a corporation for which a receiver has been appointed, the effect of which judgments will be to diminish the estate in the receiver's hands, or which should properly come to him, or which would prevent its proper distribution to those equitably entitled thereto, the receiver has such a standing in court with reference to the estate that for the purpose of closing out the estate he may appear and collect what is properly owing to the corporation, and defend not only the corporation, but protect its creditors and stockholders from collusive and fraudulent judgments."

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE IN THE EXERCISE OF PRIVATE OR MUNICIPAL POWERS.

Sec. 1. *General Rule Stated.*—While the municipal corporation in performing or omitting to perform a duty imposed upon it as an agent of the State in the exercise of strictly governmental or State functions is not liable to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents,[1] yet with unanimity the courts declare that where such officers or servants are in the exercise of power conferred upon the city for its private benefit or pecuniary profit and damage results from their negligence or misfeasance, the municipality is liable to the same extent as in the case of private corporations or individuals.[2] In so far as cities exercise powers not of a governmental character, "voluntarily assumed powers intended for the private advantage and benefit of the locality and its inhabitants, there seem to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for purposes essentially private would be liable."[3] Notwithstanding the

[1] Hill v. Boston, 122 Mass. 344, 23 Am. Dec. 332, 50 Cent. L. J. 84 *et seq.*

[2] Murtaugh v. St. Louis, 44 Mo. 479; Keating v. Kansas City, 84 Mo. 415; Carrington v. St. Louis, 89 Mo. 208; Ulrich v. St. Louis, 112 Mo. 138; Donahoe v. Kansas City, 136 Mo. 657; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762.

[3] Per Stayton, J., in Galveston v. Posnainsky, 62

rule in Michigan has long obtained that municipalities are not usually responsible in damages for the neglect of persons in public office, unless made so by statute,[4] at an early day the supreme court of that State established the principle, in recognition of the private character of the municipal corporation, that where a city is engaged in making a work which is its private property as a municipality, and not a mere public easement, and done under city employment or contract, it is responsible for injuries caused by neglect in its process of construction, as it is for any such action as directly injures private property[5].

Sec. 2. *Liability Growing Out of Management of Property.*—Municipal corporations are to be regarded as artificial persons, owning and managing property, and in this capacity they are chargeable with all the duties and obligations of other possessors of property and must respond in damages for all their torts connected therewith, in like manner as natural persons or private corporations. But it should be noted that as relates to the management of property concerning governmental, as distinguished from municipal affairs, the adjudications are decidedly conflicting; however, this want of harmony is chiefly confined to the management of highways, and drains and sewers established to promote the public health. The tendency of the later cases is to consider that the duty of these bodies to keep property under their control in a safe condition as a private rather than a public or governmental duty, and hence they are ordinarily held liable for injury to others growing out of their omission to do so, notwithstanding the property in question is not private corporate property from which the city is deriving profit, but strictly public or governmental, producing no revenue to the local corporation.[6] The earlier cases, and some of the later ones, hold that these corporations are liable in the management of the property only when it is controlled for corporate profit or pecuniary advantage to their inhabitants; denying all liability for negligence in the management of public or governmental property.[7] By almost unanimity of decision the principle is sustained that municipal corporations must respond in damages for injuries resulting from their negligent management of property under their control if such property is held for pecuniary profit, although it may be used principally for governmental purposes. Thus, if, in repairing a building belonging to the city, and used in part for municipal purposes, and in considerable part also as a source of revenue to the corporation, the agents and servants of the city dig a hole in the ground adjoining, and negligently leave it open and unguarded, so that a person rightfully walking on a path leading by the building, although not a public highway, falls into such hole, and is injured, the city will be liable to an action at common law for the injury.[8] The doctrine as to liability for negligent management of property has been farther extended in a recent Oregon case where it was held that the fact that waterworks of a city were built under authority imposed upon it by the legislature, and under the direction and supervision of a committee appointed by the legislature, will not exempt the city from the general rule which imposes upon municipal corporations needing and operating such works liability for injuries to private individuals through their negligent construction or operation.[9] The weight of authority unites in supporting the rule of responsibility whenever the violated duty is itself municipal, although it may concern or be related to governmental affairs. Thus, in a recent New York case, it has been held that the duty imposed by statute on the city to remove dirt from its streets and ashes and garbage from abutting residences is a *quasi*-private duty, and therefore the city was held liable for the wrongful acts of its serv-

Tex. 118, 13 Am. & Eng. Cor. Cases, 484, quoted with approval in 15 Am. & Eng. Ency. Law, 1141; 2 Dillon, Munic. Corp. § 980.

[4] Detroit v. Blackeby, 21 Mich. 84, approved in O'Leary v. Board, etc., 79 Mich. 281, 285.

[5] Detroit v. Corey, 9 Mich. 165, approved 79 Mich. 285; Ashley v. Port Huron, 35 Mich. 296; Defer v. Detroit, 67 Mich. 346.

[6] See Cooley on Torts, 619, 620; Ashley v. Port Huron, 35 Mich. 296; Rowland v. Kalamazoo County, 49 Mich. 553, where at page 560 it is said than an examination of the authorities will show that "municipal corporations, in the care and management of their property like an individual, are in duty bound to produce no injury to others."

[7] Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Eastman v. Meredith, 36 N. H. 296; Ham v. New York, 70 N. Y. 459.

[8] Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485.

[9] Esberg Gunst Cigar Co. v. Portland, 33 Oreg. 43 L. R. A. 435. See Mayor, etc. v. Bailey, 2 Denio (N. Y.), 433; Darlington v. Mayor, etc., 31 N. Y. 164; Barnes v. District of Columbia, 91 U. S. 540, 552; Wright v. Holbrook, 52 N. H. 120, 13 Am. Rep. 12.

ants while engaged in such service.[10] This case regards the duty as an essentially private one, resting originally on the individual property owner, and assumed by the municipality merely for the convenience and advantage of its citizens. This view would seem to be consistent with the historical development of the assumption of such duties by municipalities, and the result appears to be in accord with the general tendency shown by recent cases to broaden the liability of public corporations for the tortious acts of their agents. But in a recent Tennessee case, through the negligence of the driver, a sprinkling cart in the service of the city struck the plaintiff's buggy and injured the plaintiff, it was held that the city was not liable, as its servant was engaged in a governmental duty of the city in promoting the public health.[11] Things done for pecuniary profit by the city are regarded as strictly municipal duties.[12] Hence, the city is liable for negligence of its ice boat engaged in towing a vessel for the city's gain.[13] So there is liability for negligence in the construction and repair of an electric lighting plant.[14] And liability exists also for negligent management of real estate producing revenue to the city.[15] So, also, when the city owns a wharf, and receives and charges wharfage for its use, it is bound the same as a private individual to use ordinary care and diligence in keeping it free and safe from obstructions, and is liable in an action at common law for damages done to a vessel by reason of neglect of such duty.[16] The city must keep its docks, wharves and piers suitable for use,[17] although it may not receive pay on its own behalf for their use.[18] Municipal corporations have been held liable for the negligent management of gas works,[19] of waterworks,[20] of sewers,[21] of cemeteries,[22] of public markets,[23] and of other property.[24] However, a city is not liable in damages for injuries inflicted upon a person by the fall of a market house caused by a wind storm of unprecedented force and violence, in the absence of negligence.[25] And finally it is generally held that when a special power or privilege is conferred upon or granted to a municipal corporation, to be exercised for its own advantage or emoluments, and not as a mere governmental agency, it is liable to the same extent as an individual or a private corporation for negligence in managing or dealing with the property rights or franchises held by it under such grant.[26]

[10] Quill v. Mayor of New York, 55 N. Y. Supp. 889, denying Davidson v. New York, 54 N. Y. Supp. 57. *Contra:* Love v. Atlanta, 95 Ga. 129.

[11] Connelly v. Mayor of Nashville, 100 Tenn. 262, 46 S. W. Rep. 565. This case is denied in Quill v. Mayor, etc., 55 N. Y. Supp. 889, 892. Maxmillian v. New York, 62 N. Y. 160, negligence of ambulance driver; Burrill v. Augusta, 78 Me. 118, negligence of hook and ladder company. See Lafayette v. Allen, 81 Ind. 166, where a city was held liable to an engineer who was put to work on a defective fire engine. When city is liable for damages caused by the erection of a pest house, see Clayton v. Henderson (Ky.), 44 L. R. A. 474. County liable for a nuisance resulting in injury caused by a small pox hospital. Haag v. Vanderberg County, 60 Ind. 511, 28 Am. Rep. 654. City not liable for negligence of boiler inspector. Mead v. New Haven, 40 Conn. 72.

[12] 2 Dillon, Munic. Corp. § 985.

[13] Philadelphia v. Garagrin, 17 U. S. App. 642.

[14] Bullmaster v. St. Joseph, 70 Mo. App. 60.

[15] Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185; Jones, Neg. Munic. Corp. § 38, and cases; Bailey v. New York, 3 Hill (N. Y.), 531.

[16] Petersburg v. Applegrath, 28 Gratt. 321, 26 Am. Rep. 357; Pittsburg v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Mersey Docks & Harbour Board v. Gibbs, 11 H. L. Cas. 686; Seaman v. New York, 80 N. Y. 239; Kennedy v. New York, 73 N. Y. 365, 29 Am. Dec. 169; Jones on Neg. Munic. Corp. p. 71, note 2.

[17] Jones, Neg. Munic. Corp. § 39.

[18] Mersey Docks & Harbour Board v. Gibbs, 11 H. L. Cas. 686. Wilkins v. Rutland, 61 Vt. 336, holds that where a city maintains a system of waterworks for the double purpose of supplying the inhabitants with water for private purposes and providing against fire there is municipal liability for any negligence in that portion of the system supplying individuals for hire.

[19] Western Savings Society v. Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730; Kibele v. Philadelphia, 135 Pa. St. 41; San Francisco Gas Works v. San Francisco, 9 Cal. 453.

[20] Stoddard v. Winchester, 157 Mass. 567; Brown v. Atlanta, 66 Ga. 71; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434; Stock v. Boston, 149 Mass. 410; Hand v. Brookline, 126 Mass. 324; Wilkins v. Rutland, 61 Vt. 336; Grimes v. Keene, 52 N. H. 330, 335; Powers v. Fall River, 168 Mass. 60; Lynch v. Springfield (Mass.), 54 N. E. Rep. 871. *Contra:* Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 665.

[21] Murphy v. Lowell, 124 Mass. 564.

[22] Toledo v. Cone, 41 Ohio St. 149, holding that the principle of *respondeat superior* applies to municipal corporations where the acts of their servants or agents refer to powers and duties ministerial in their nature and character.

[23] Barron v. Detroit, 94 Mich. 601, 34 Am. St. Rep. 366; Suffolk v. Parker, 79 Va. 660, 52 Am. Rep. 640; Littlefield v. Norwich, 40 Conn. 406; Savannah v. Cullens, 38 Ga. 334; Weymouth v. New Orleans, 40 La. Ann. 344.

[24] Cowloy v. Sunderland, 6 H. & N. 565, injury resulting from negligence in managing a wringing machine kept in a public wash house.

[25] Flori v. St. Louis, 69 Mo. 341.

[26] Esberg Gunst Cigar Co. v. Portland, 33 Oreg. 43

Sec. 3. *Ground of Liability Stated.*—Under the adjudications it is thus manifest that responsibility growing out of the management of property may be based on either of the two grounds: First. That the municipal corporation is managing property. As the corporation is in full control of the property, in like manner as the individual and private corporation, it should be required to so manage it as not to cause damage to others, and all who, in the exercise of due care, are damaged by reason of the negligent management of such property should be given the right of private action against the corporation, otherwise they are denied legal protection in this respect. Although the property may be governmental, as that term is used, and be nonproductive to the city, the duty to properly care for it should in all cases be regarded as private as distinguished from public. Second. Where damage grows out of the negligent management of property in connection with public work of a local or purely municipal character liability exists. In actions of this character municipal corporations have sought to avoid responsibility by attempting to show that the neglected duty in the particular case was legislative or judicial as distinguished from ministerial. But this doctrine is to be reasonably applied, and the city, under the guise of it, will not be allowed to cause damage, as, for instance, in maintaining a nuisance.[27] So, under cover of the doctrine, the city will not be exonerated where damages result from a flagrant misuse of discretion, as in the adoption of a defective plan for public work.[28]

Sec. 4. *Liability for Negligence in Constructing Public Works and Failure to Keep in Repair—Sewers and Drains.*—The city will be held liable for damages directly resulting from the careless or unskillful manner of constructing public work,[29] as, for example, a sewer,[30] and when it is completed the ministerial duty to use ordinary care to keep it in repair and free from obstruction so that its capacity may be used and enjoyed is mandatory.[31] "The work of constructing sewers is ministerial, and when the corporation undertakes this work it is responsible in a civil action for damages caused by the careless or unskillful performance of the work."[32] And a city authorized by its charter to establish sewers cannot escape liability for its negligence on the ground that it did the work directly through the superintendent of its streets when its charter provided that it should be done by contract to the lowest bidder.[33] Where the superintendent of the streets of a city, having charge of the construction of a sewer, provides all material for bracing the sides of the work and directs the manner of placing them, and the work is done accordingly, and a laborer, while working in the trench, is injured because of defective bracing, such negligence is that of the city and not of a fellow-servant, though a foreman was in immediate charge of the work.[34] "So it is the duty of corporations to keep sewers in repair, and if they are negligently permitted to become obstructed or filled up, so as to cause the water to flow back and do injury, there is a liability on the part of the corporation having control over them."[35] This rule "seems to be the general, if not uniform, doctrine on this subject. The sewers of the city are its private property;

L. R. A. 435, 440. The mere happening of an accident causing injury is evidence of negligence whenever the thing causing the injury is under the control of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. Esberg Gunst Cigar Co. v. Portland, 33 Oreg. 43 L. R. A. 435. For some cases as to presumptions from accidents resulting in injury, see Shafer v. Lacock (Pa.), 29 L. R. A. 254; Judson v. Giant Powder Co. (Cal.), 29 L. R. A. 718; Ryder v. Kinsey (Minn.), 34 L. R. A. 557; Scott v. London & St. K. Docks Co., 3 Hurlst. & C. 596; 1 Shear. & Red. Neg. §§ 59, 60; Thomp. Neg. 1230; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Warren v. Kauffman, 2 Phil. 259; Huey v. Gahlenbeck, 6 Am. St. Rep. 790.

[27] Speir v. Brooklyn, 139 N. Y. 6, 21 L. R. A. 641, 36 Am. St. Rep. 664; Cohen v. New York, 113 N. Y. 532; Stanley v. Davenport, 54 Iowa, 463; Little v. Madison, 42 Wis. 643.

[28] Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Defer v. Detroit, 67 Mich. 346; Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664; Pye v. Mankato, 36 Minn. 373; New Jersey Soule v. Passaic, 47 N. J. Eq. 28; Terre Haute v. Hudimet, 112 Ind. 542; Spangler v. San Francisco, 84 Cal. 12.

[29] Boulder v. Fowler, 11 Colo. 396.

[30] Frostburg v. Duffy, 70 Md. 47.

[31] Woods v. Kansas City, 58 Mo. App. 272, 279; Stewart v. Clinton, 79 Mo. *l. c.* 612; Foster v. St. Louis, 71 Mo. 157; Taylor v. St. Louis, 14 Mo. 20.

[32] Per Wagner, J., in Thurston v. St. Joseph, 51 Mo. *l. c.* 519; Donahoe v. Kansas City, 136 Mo. 657; Roll v. Indianapolis, 52 Ind. 547. Compare Child v. Boston, 4 Allen (Mass.), 41, and Barry v. Lowell, 8 Allen (Mass.), 127.

[33] Donahoe v. Kansas City, 136 Mo. 657.

[34] Donahoe v. Kansas City, 136 Mo. 657.

[35] Per Wagner, J., in Thurston v. St. Joseph, 51 Mo. l. c. 519.

the citizens alone are interested in them, the general public of the State at large has no interest in them, any more than they have in the waterworks when owned by a city, by which its citizens are supplied with water, and in this very important particular differ from the streets of the city, which are for the benefit of the public generally."[36] As the city is liable for the negligent management of its sewers, an explosion of a sewer underneath residence property is itself entitled to be considered as warranting an inference of some negligence. Notice of facts may be inferred from lapse of time when they are of such a nature as to attract general public attention.[37] Where, in consequence of the negligent manner of constructing a sewer, a private lot is flooded by water, the city will be liable for the resulting damage. Such a work is not a matter of supreme necessity involving the safety of the people. Hence, the maxim "*salus populi suprema lex*" can have no application. The right to the use of the street is a property interest, and the lot holder is as much entitled to protection in it as in the lot itself. Hence, the landowner will be entitled to compensation for the resulting injuries under the State constitution.[38] So where water accumulating on the street by reason of obstruction to the catch basins of sewers, overflows and damages private property, the rule of surface water being a common enemy which everyone may fight off his own premises, has no application, since the property owner had a right to rely on sewers built at the expense of the property owner for the purpose, among others, of conveying off such surface water.[39] Thus, when a city neglects, after notice, or after such time as notice will be imputed to it, to remove an obstruction in its sewers, and property is overflowed and damaged by reason thereof, a cause of action exists.[40] Although the rain doing the damage was of an extraordinary character, yet if the negligence of the city in failing to keep its sewers open concurred and contributed to the damage, then the city would be liable.[41] A city is liable in an action for damages for piling stone in a street gutter, causing the overflow of surface water on the abutting property to its damage; and the principles of law as to surface water do not apply in such action.[42] A city is only liable for the want of ordinary care in providing and maintaining sufficient curbing, guttering and sidewalks. If, "by reason of the want of such care and prudence, the curbing and guttering become defective and out of repair, and this defective condition of the curbing and guttering becomes an active agency with the act of God in producing the damage, then the city will be liable. The commingling negligence of the city must amount to the want of ordinary care."[43] There is a wide difference between the power of a municipality with respect to natural streams and surface water. A municipality has not the right, with respect to the former, to injure the property of others "by badly constructed and insufficient culverts or passageways obstructing the free flow of water."[44] Thus, a city was held liable for the damages caused by damming up a water course in the grading and filling of certain streets.[45] Likewise, a city was held liable for damages caused by it in changing the channel of a natural stream under the authority of its charter by reason of the new channel having been constructed of a width and depth insufficient to afford a passageway for the water of the stream equal in capacity to the old channel.[46] In approving and applying this doctrine, the Kansas City Court of Appeals said: "In making

[36] Per Burgess, J., in Donahoe v. Kansas City, 136 Mo. *l. c.* 667; Johnson v. District of Columbia, 118 U. S. 21; Woods v. Kansas City, 58 Mo. App. 272; Collins v. Waltham, 157 Mass. 196; Hazzard v. Council Bluffs, 79 Iowa, 106; Kearney v. Thoemanson, 25 Neb. 147; Seymour v. Commins, 119 Ind. 148; Rice v. Evansville, 108 Ind. 7, 58 Am. Rep. 22; 2 Dillon, Munic. Corp. §§ 980, 1049.

[37] Fuchs v. St. Louis, 133 Mo. 168.

[38] Thurston v. St. Joseph, 51 Mo. 510, in effect overruling St. Louis v. Gurno, 12 Mo. 414; Taylor v. St. Louis, 14 Mo. 20; Hoffman v. St. Louis, 15 Mo. 651.

[39] Woods v. Kansas City, 58 Mo. App. 272.

[40] Woods v. Kansas City, 58 Mo. App. 272.

[41] Woods v. Kansas City, 58 Mo. App. 272. See Chicago & W. Ind. R. R. Co. v. Ayers, 106 Ill. 578.

[42] McInery v. St. Joseph, 45 Mo. App. 296.

[43] Haney v. Kansas City, 94 Mo. 334, 336, citing Rodgers v. R. R., 67 Cal. 607. See Judd v. Hartford (Conn.), 44 Atl. Rep. 510; Louisville v. O'Malley (Ky.), 53 S. W. Rep. 287.

[44] 2 Dillon, Munic. Corp. (3d Ed.) § 1038, approved in Young v. Kansas City, 27 Mo. App. *l. c.* 115.

[45] Rose v. St. Charles, 49 Mo. 509.

[46] Imler v. Springfield, 55 Mo. 119, where it was said, at page 126: "A liability would exist against a city for filling up or damming back a stream of running water, so that it would overflow its banks and flow upon the land of another; but a very different rule exists with reference to surface water." The doctrine of this case was approved and applied in Barnes v. Hannibal, 71 Mo. 449, 451.

the culvert in the present case it was the duty of the defendant, absolute and imperative, to so make the culvert as not to obstruct the water of the running stream, to the injury of others. As to that duty the defendant had no discretion. The defendant did not have to build a culvert at all, but in building a culvert, when it was determined to build one, the defendant had to build one in accordance with the requirement named, *i. e.*, so as not to obstruct the water of the stream, to the injury of others. The defendant had to build a sufficient culvert; the defendant had not the right in building a culvert to create a nuisance. Hence, the act of determining the dimensions of the culvert was a ministerial, and not a judicial act, and defendant was liable for all damages caused by the insufficiency of the said dimensions."[47]

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[47] Per Hall, J., in Young v. Kansas City, 27 Mo. App. *l. c.* 116, citing numerous authorities.

ESTOPPEL — SILENCE — FAILURE TO ASSERT TITLE—PLEADING—DEFECT OF PARTIES.

RADANT v. WERHEIM MFG. Co.

Supreme Court of Wisconsin, April 27, 1900.

Plaintiff and his father lived on premises of which the father was vendee in an unrecorded land contract, which he had assigned to plaintiff. Plaintiff ordered building material of defendant for use in constructing a building on the land, defendant supposing the material sold to plaintiff's father. Defendant filed a material man's lien on the property, the summons and complaint being served on the father; but plaintiff, supposing himself the person sued, appeared and answered, but, discovering on trial that the father was sought to be sued, withdrew his answer, without disclosing the true state of the title. Held, that plaintiff, by his silence till defendant had incurred the expense of obtaining the lien, had estopped himself from asserting the true state of the title in an action by him to restrain a sale of the property on the judgment against the father.

A defect of parties in a complaint will be deemed waived, unless taken advantage of by answer or demurrer.

MARSHALL, J.: Action to remove a cloud on the title to real estate on the following facts: In 1873, when plaintiff was quite a boy, his father, August Radant, Sr., purchased the real estate in question for a home for himself and family and occupied the same as such thereafter, the son residing with him. March 25, 1889, Radant, Sr., conveyed the property to one Henry Gruenwald by deed absolute on its face for the purpose of securing a loan of money, taking back, as evidence of his interest in the property, a land contract. The deed and contract were immediately recorded in the office of the register of deeds of the proper county. A few days thereafter Radant, Sr., assigned his land contract to plaintiff, but the assignment was not recorded till May 27, 1897, during all of which time August Radant, Sr., to all appearance, was the owner of the property the same as he always had been, save and except for the mortgage thereon created by the transactions with Gruenwald as before stated. The land contract was assigned to plaintiff partly as a gift from the father and partly in consideration of what plaintiff had done by way of improving the property. In 1895 the Radants obtained some building material of the defendant for use in constructing a building on the land. The plaintiff intended in the transaction to become the defendant's debtor for the building material, but defendant supposed its customer was Radant, Sr. The material not being paid for a lien was filed on the property pursuant to the laws of this State relative to mechanics' and material-mens' liens, and thereafter an action was commenced to enforce such lien. The summons and complaint were served on Radant, Sr., but plaintiff, supposing he was the person intended to be sued, appeared in the action and answered. Plaintiff discovered on the trial that the real party sought to be charged was Radant, Sr., whereupon he withdrew his answer without disclosing the true state of the title to the property. He kept silent, with full knowledge of the facts, while defendant proceeded to perfect judgment against Radant, Sr., as the debtor and the owner of the property sought to be charged with such debt. Thereafter defendant proceeded to enforce such judgment by a sale of the property, whereupon this action was commenced to restrain such sale and to quiet the title to the property in plaintiff as against such judgment. On the trial the defendant offered to release its claim to a lien against the property on payment of the original indebtedness claimed in the complaint, which proposition plaintiff refused to accept. On such facts the court decided that defendant was entitled to a dismissal of the action and to recover its costs and disbursements of the plaintiff because of a defect of parties defendant, in that Henry Gruenwald, and others not necessary to be mentioned, were not joined as defendfendants, and for want of equity. Judgment was rendered accordingly.

The judgment appealed from is grounded, first, on a defect of parties, and, second, want of equity. The first ground mentioned is untenable. A defect of parties must be taken advantage of by demurrer if it appears on the face of the complaint, otherwise by answer, or it will be deemed to have been waived. Kimball v. Noyes, 17 Wis. 695; Druetzer v. Lawrence, 58 Wis. 594, 17 N. W. Rep. 423; Hallam v. Stiles, 61 Wis. 270, 21 N. W. Rep. 42. The objection that there is a defect of parties, either plaintiff or defendant, is never a good ground for the dismissal of a complainant on a trial upon the merits.

The second ground upon which appellant's claim was dismissed must be sustained, if at all, upon the familiar principle of equitable estoppel, that "he who keeps silent when in good conscience he ought to speak shall be debarred from speaking when conscience requires him to be silent."

If appellant owed a duty of disclosure to respondent respecting his title, and, by failure to do so, respondent was led to incur expense to perfect his lien judgment and enforce it, upon the belief that Radant, Sr., was the owner of the property, equity cannot properly aid him to change his situation to respondent's prejudice.

Among the earliest applications of the principles under discussion are cases where the owner of property stood by without disclosing his ownership, while another in good faith dealt with such property as that of a third person; and it was held that such owner was in duty bound to correct the error of such other before he so acted as to be prejudiced thereby. Pickard v. Sears, 6 Adol. & E. 469; Gregg v. Wells, 10 Adol. & E. 90; Heane v. Rogers, 9 Barn. & C. 577, 586; Graves v. Key, 3 Barn. & Adol. 313, 318; Niven v. Belknap, 2 Johns. 572. In Pickard v. Sears, *supra*, to which most of the later authorities refer, it was said, in effect, that one who stands by and keeps silent while his property is being dealt with in good faith as the property of another, ceases to be the owner of such property so far as otherwise the party misled would suffer. That is elementary and has often been applied by this court. Waddle v. Morrill, 26 Wis. 611; Anderson v. Coburn, 27 Wis. 558; Kingman v. Graham, 51 Wis. 232, 8 N. W. Rep. 181; Manufacturing Co. v. Monahan, 63 Wis. 198, 23 N. W. Rep. 109. That doctrine was applied in Baehr v. Wolf, 59 Ill. 470, where a person who held an unrecorded land contract, knowing that another was negotiating to purchase the land of his vendor without notice of the existence of such contract, failed to notify such other of the true state of the title.

The last case cited brings out the principle under discussion, as applicable to this case, quite clearly. It appears by the record that respondent dealt with Radant, Sr., as the owner of the property in controversy, from the time the indebtedness accrued. The appellant knew that fact soon after the action was commenced. His claim to the property was under an unrecorded land contract. He knew, or ought to have known, from the time the action was commenced, that respondent was proceeding in error as to the true state of the title. He was the real beneficiary of the material for which the indebtedness constituting the lien claim accrued. Notwithstanding these facts, he kept silent as to his unrecorded contract, though he at one time actually appeared in the action, till respondent had incurred the expense of obtaining the lien judgment and further expense toward enforcing it, and then, without offering to pay for the material, for which appellant acknowledged on the trial of this action he was the real debtor and beneficiary, he commenced such action.

Equity cannot aid the appellant, under the circumstances stated, to prevent the enforcement of the lien judgment. It will consider Radant, Sr., for the purposes of this action, as the owner of the property affected by the judgment.

Appellant could readily have brought the true state of the title to the attention of respondent before the lien judgment was entered, and thereby have prevented its rendition and all necessity for this action, unless the judgment were based on an adjudication that the respondent's claim, under the circumstances, was a lien on appellant's interest in the property. Appellant failed to do that till respondent, with his knowledge, incurred considerable expense in efforts to collect its claim by the remedy given by the lien statute. Such failure was accompanied by circumstances clearly indicating a design to mislead respondent up to a point where appellant's interest in the property could not be reached in a lien suit. As soon as that point was supposed to have been passed, appellant placed his land contract on record so as to deter respondent from enforcing its judgment; and that not being effectual, appellant appealed to a court of equity to aid him. The trial court correctly decided that appellant has no standing in a court of equity.

The judgment of the circuit court is affirmed.

NOTE.—*Recent Decisions on Equitable Estoppel by Silence and Failure to Assert Title.*—When one who holds a mortgage on part of a tract of land permits the owner to mortgage it to another who insists upon a first mortgage as security, and takes the proceeds of the loan to apply on debts due him, saying nothing about his own mortgage, of which all parties but himself are ignorant, though it is recorded, he is estopped to set it up as against the new mortgagee. Kuhn v. Morrison, 23 C. C. A. 619, 78 Fed. Rep. 16. Where a widow paid off a mortgage given by her deceased husband, in which she joined, and suffered a third party to purchase the shares of the heirs in the mortgaged property, without asserting any claim, she was estopped from claiming a lien by reason of such payment. Taylor v. Dawson, 65 Ill. App. 232. That one lived in the vicinity for 10 years after suit was brought to subject certain lands to the payment of a decedent's debts, and knew of a mortgage thereon, but never appeared, or in any way claimed the land, though it was in the possession of the others, who were using it as their own, is a circumstance tending to show that whatever claim he had against the land was satisfied in the decedent's lifetime. Doss v. Kincheloe's Admr. (Ky.), 36 S. W. Rep. 1127. When property is taken under a writ in the presence of a third person who is in possession of it under claim of title, but the officer taking it acts in ignorance of such claim, and such third person, with every reason to believe that he is regarded merely as the bailee of the defendant to the writ, fails to in any manner disclose his title to the officer, and, moreover, virtually consents to the taking of the property, he is estopped from asserting that the taking was tortious. State v. Staed, 65 Mo. App. 487. One of several claimants of alluvial land who acts as conveyancer between two others, and fails to assert at the time a different title

to the land, which he knows they think is being conveyed, cannot afterwards urge such title as against them. Price v. Hallet (Mo. Sup.), 38 S. W. Rep. 451. Where plaintiff in replevin obtained possession under a bill of sale from the husband, defendant was not estopped from claiming title under the wife by the mere fact that she frequently saw the property in plaintiff's possession. Ingalls v. Alexander (Mo. Sup.), 39 S. W. Rep. 801. That a mother who, in good faith, loaned to her son money with which to buy a store, and, upon his subsequent insolvency, induced him to confess judgment in her favor for the debt, knew that he was conducting the business solely on the money borrowed from her, but neglected to give the public notice of that fact, did not estop her from claiming the proceeds of the sale under the judgments confessed, as against the son's other creditors. H. T. Clarke Drug Co. v. Boardman (Neb.), 70 N. W. Rep. 248. Defendant, mortgagee, and mortgagor agreed that defendant was to buy the premises, paying a fixed sum therefor, part of which was to be paid to the mortgagee in satisfaction of his claim, part applied in payment of mortgagor's debts, and the balance paid to him. Pursuant thereto the mortgagee conveyed to defendant. Held, that the mortgagor was estopped from claiming that defendant held title as a mortgagee, and one claiming under an unrecorded conveyance from him was likewise so estopped, under Gen. St. 1888, sec. 215, providing that deeds shall take effect as against subsequent *bona fide* purchasers and incumbrancers only after recording. Sliney v. Davis (Colo. App.), 53 Pac. Rep. 686. When the contract vendee of land, under a contract contemplating the erection of a building on the premises, lets contracts for the work, and the contract vendor, with knowledge of the facts, fails to disclose his legal title to the contractor, he will be estopped to set up his lien for purchase money to the prejudice of the contractor's lien. Rice v. Gould, 73 Ill. App. 538. A married woman, who joins with her husband in a mortgage of land which by unrecorded deed he had conveyed to her, having joined with him in leading the mortgagee to suppose it was still his property, is estopped to assert against the mortgagee, after he had acted to his disadvantage on the supposition, the statute relieving a married woman from liability on a contract of suretyship. Galvin v. Britton (Ind.), 49 N. E. Rep. 1064. A wife, with the knowledge of her husband, included property belonging to him in a mortgage given by her to secure her debt. The husband made no objection, except to his wife, but allowed her to obtain goods on the faith of the mortgage, assisted her in selling them, and did not inform the mortgagee that he claimed the property until two years after the execution of the mortgage. Held, that the husband was estopped from asserting his ownership as against the mortgagee. Churchill v. Hohn (Ky.), 45 S. W. Rep. 498. When the original purchaser at a tax sale and subsequent grantees took the land with knowledge that the tax judgment was void because rendered against a dead person, who left a will devising the land, the failure to record the will, as required by Rev. St. 1889, sec. 8899, does not estop the devisees from claiming title. Dameron v. Jamison (Mo.), 45 S. W. Rep. 258. An intestate left a house and lot, which descended to his widow, two daughters, and a minor son. The husband of one of the daughters bought the property, taking a deed from all the heirs, except his wife and the minor son, and an agreement signed by the minor son and signers of the deed, providing for the execution of a conveyance of the son's interest on his becoming of age. All the heirs except the wife, who was not included, received their share of the consideration of the deed. The son died under age and unmarried. Later, the husband conveyed the property to the plaintiff. Held, that since the daughter had never in her lifetime asserted any right to the property of the deceased son, though she knew his title had not been conveyed, nor did her heirs at law assert title until many years afterwards, the grantee in the meantime having made valuable improvements thereon, the doctrine of equitable estoppel applies to the daughter and heirs as heirs of the deceased son. Jones v. Duerk, 49 N. Y. S. 987, 25 App. Div. 551. A grantee of a deed stipulating that he should pay the interest on certain mortgages on the property conveyed, is estopped, after payment of such interest on two occasions to say that he did not know of the condition, and is not bound by it. White v. Kenyon, 53 N. Y. S. 13. Where one, after mortgaging property, sold it, the purchaser agreeing to pay the mortgage notes, the mortgagee who takes the notes of the purchaser in place of those of the mortgagor, and surrender's the mortgagor's notes to him, and by his conduct and actions with respect to the property leads the mortgagor to believe that his notes are discharged so far as he is concerned, whereby the mortgagor is induced to act on this theory in his relations and dealings with the property, is estopped to assert the notes and the lien of the mortgage therefor against the mortgagor. Hale v. Dykes (Tenn. Ch. App.), 42 S. W. Rep. 64. Where a man, after conveying property through a third party to his wife, took and recorded a power of attorney from her, authorizing him to manage the property as her agent, under which he made leases in her name, and during the remaining 30 years of his life many times admitted, and never denied, her title to the property, his devisees are estopped from denying the legal sufficiency of the deeds by which the title was conveyed to her. Robb v. Day (U. S. C. C. of App.), 90 Fed. Rep. 337. Where a mortgagor's son, who had a lien on the land, took an active part in procuring the loan, and often inquired how the negotiations were getting along, and rode over the land with the agent who procured the loan, and did not tell them of the lien, he is estopped from claiming a lien superior to the mortgage. Ashurst v. Ashurst (Ala.), 24 South. Rep. 760. Where an administrator, acting under a misapprehension as to the law, believes that certain land belongs to his decedent's estate, when as a matter of fact he is one of the owners, sells it for the payment of his decedent's debts to one with knowledge of the facts, but also mistaken as to the law, he is not thereby estopped from afterwards claiming his interest in the land. Gjerstadengen v. Van Duzen (N. Dak.), 76 N. W. Rep. 233. Where defendant stood by and permitted representatives of complainant's grantor to survey land for the purpose of selling it to complainant, and permitted the sale, without asserting any claim or title, he is estopped to assert title. Tennessee Coal, Iron & Railroad Co. v. McDowell, 100 Tenn. 565, 47 S. W. Rep. 153. Where a judgment creditor, having a lien on real and personal property, sold the latter, but made no attempt to enforce his lien against the former, which the debtor conveyed to a subsequent attaching creditor, who thereafter with knowledge of the judgment creditor, paid the taxes thereon for several years, it was held that the judgment creditor was estopped to claim that the conveyance was void because defectively executed. Call v. Cozart (Tenn. Ch. App.), 48 S. W. Rep. 312.

CORRESPONDENCE.

STARE DECISIS.

To the Editor of the Central Law Journal:

If all the crimes against humanity that have been committed in the name of law under the plea of *stare decisis* could be properly scheduled it would be astounding to behold. All the murders committed since the days of Cain would not equal it. To the layman these simple words, though incomprehensible, appear innocent enough. The Latin coating in which this legal term is couched may, and no doubt does, give it an air of respectability; it does give it a veneering, antique and semi sacred, but herein lies the danger. Nevertheless as a legal term, and a legal principle, it was conceived in sin and brought forth in iniquity. No man knows its origin. It parentage is obscurity itself, wrapped up in that *status* of uncertainty, suggestive, at least, of illegitimacy. It has no relations, not even next of kin. *Stare decisis!* Think of its power and influence in the world. It has robbed millions of men of all that was near and dear to them. The sacred precincts of the constitution have been invaded and its honored precepts trampled down by the cloven feet of this monster. The wheels of legislation have been clogged by its unholy touch. Civilization in its onward march has been retarded by its influence. If there is anything human in all this wide world that should inspire mankind with hope, hope in his personal security, hope in the enjoyment of life, liberty and the pursuit of happiness, hope in all that makes life worth living, it should be found in our courts. But alas it is there, more than any where else, that this plague of humanity finds its virgin soil and an atmosphere propitious for its growth. Our schools, colleges and universities may sharpen the intellect, and our charitable institutions may do much to relieve the sufferings of mankind, but, after all, it is to the courts we must look for relief from nine-tenths of the ills that beset us. There the rich and poor alike may go for even and exact justice in all the relations of life. It is there the scales of justice are evenly balanced and the presiding goddess is blind. It is there that decrees and judgments mete out to each and all the full measure of justice and equity, unless, indeed, some accident or adverse wind has wafted to the wool sack some moss covered sinbad who places a higher estimate upon precedent than justice. In such case right and justice, law and equity, are thrown to the wind, because forsooth of some judicial *ipse dixit* that never was the law, and should not have been followed. Illustrations are numerous. In Booth v. Clark, 17 How. 322, a principle of law regarding personal property was established in the Supreme Court of the United States which had been overthrown by the highest courts of England for nearly a hundred years, and had received the condemnation of Chancellor Kent, and other able jurists of this country, and was contrary to the public policy of all continental Europe. In Bowen v. Parkhurst, 24 Ill. 247, a principle of law was established by the Supreme Court of Illinois which was contrary to the great weight of authority of this country at the time, and has been repeatedly attacked as unsound by the bar from that time to this. Both of these cases still stand as the law of their respective jurisdictions, not because they are law or right, but purely and simply because of the doctrine of *stare decisis*.

Chicago, Ill. JOHN W. SMITH.

BOOK REVIEWS.

READINGS IN THE LAW OF REAL PROPERTY.

The plan of this work is one of those happy thoughts the simplicity and utility of which cause us to wonder that it had not been thought of before. Every one who has tried wading through the writings of the old masters in search of living principles that lie buried beneath so many technicalities and obsolete doctrines, has felt the burden which this publication seeks to remove: Namely, that of being compelled to read so much that is of no practical utility in order to get at the foundation principles of the law from original sources of authority. By judicious selections from the writings of those authors who have most clearly and succinctly stated the elementary principles of the law, the editor of this compilation has succeeded in producing a connected treatise, at once historical and elemental in character.

The compiler of this collection is Mr. George W. Kirchwey, Professor of law in Columbia University. His work is primarily intended for the use of students. It will also be valuable to the practitioner as a book of reference, embracing as it does extracts from the leading authorities from Glanville and Bracton down to the more noted of modern text writers, supplemented by the principal English and American statutes bearing upon the nature of estates and the creation and transfer of interests in land. The plan of the publication is to some extent a departure from the usual method of preparing text books, and has the disadvantage, it may be said, of destroying that feeling which places the reader more closely in touch with the author of an original production. A feeling which is, perhaps, more a matter of imagination than reality, yet nevertheless a real factor in the interest awakened in the mind of the reader. Then, too, there is naturally more continuity of thought in a treatise written throughout by a single author in a uniform style of expression. It is doubtful, therefore, if collections of this character will ever become popular as a class. But the subject of real property is peculiarly adapted to this manner of treatment. The history and classification of estates and the elementary principles governing their creation and transfer are more clearly and adequately expounded by the old masters, while the technical discriminations which incumber the mare for the most part obsolete, and may be eliminated with profit to the reader. The editor of this collection has rendered valuable service to the historical student of the law of real property. The book contains 500 pages, 8vo. bound in buckram, printed on good paper. Published by Baker, Voorhis & Co., 66 Nassau St., New York.

BOOKS RECEIVED.

American Bankruptcy Reports Annotated (Cited Am. B. R.) Reporting the Bankruptcy Decisions and Opinions in the United States, of the Federal Courts, State Courts and Referees in Bankruptcy. Edited by Wm. Miller Collier, Author of "Collier on Bankruptcy," and James W. Eaton, Instructor on the Law of Bankruptcy in the Albany Law School. Vol. III. Albany, N. Y. Matthew Bender, Law Publisher, 1900. Review will follow.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those

Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 72. San Francisco: Bancroft Whitney Company, Law Publishers and Law Booksellers, 1900. Review will follow.

HUMORS OF THE LAW.

A gentleman who had a suit in Chancery was called upon by his counsel to put in his answer, for fear of incurring a contempt. "Well," says the client, "why is not my answer put in then?" "How should I draw your answer," saith the lawyer, "without knowing what you can swear?" "Hang your scruples," says the client again; "pray do your part of a lawyer, and draw me a sufficient answer; and let me alone to do the part of a gentleman, and swear it."

In Ireland nothing seems to be taken seriously but politics. Even the law has its comical side, as may be seen by a case recently tried at Tyrone Assizes.

The prisoner was charged with setting fire to his own shop, which he had insured. As direct evidence was scanty a good deal turned on the man's character. A petty sessions clerk deposed:

"The prisoner, though honest, is a crooked sort of a character."

Counsel: "You mean that though he is a crooked man, he is straight?"

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION — Widow's Quarantine.—Under Rev. St. 1889, § 4538, providing that a widow may remain in and enjoy the mansion house of her husband until dower be assigned, without paying rent, the widow is entitled to quarantine, whether she resides in the mansion house or elsewhere at the time of her husband's death.—KING v. KING, Mo., 56 S. W. Rep. 584.

2. AGENCY—Sale of Collateral.—Where P pledged malt to plaintiff as collateral for notes, and plaintiff sold it to defendant, the latter cannot, in an action for the price, inquire into the matter of how much was due on the notes; they not being paid, and defendant having no rights or equities against P; plaintiff having a right to collect the collateral, that it might be ready to account therefor.—RICE & BULLEN MALTING CO. v. INTERNATIONAL BANK, Ill., 56 N. E. Rep. 1062.

3. ANIMALS—Dogs—Negligent Killing.—Dogs are personal property in this State, and an action will lie in favor of the owner of a dog, having a substantial money value, for its destruction through the negligence of a third party.—SMITH v. ST. PAUL CITY RY. CO., Minn., 82 N. W. Rep. 577.

4. ANIMALS—Personal Injuries — Dogs.—Under Code 1873, § 1485, providing that the owner of a dog shall be liable to the party injured for all damages done by his dog, except when the party injured is doing an unlawful act, it is no defense to an action for injuries from a bite of defendant's dog to show that several months before the injury the plaintiff threw stones at the dog.—VAN BERGEN v. EULBERG, Iowa, 82 N. W. Rep. 483.

5. ASSIGNMENTS—Wages — Fraudulent Conveyances.—Defendant's assignment of his wages to a creditor, who collected the same and turned them over to defendant, retaining a small part to apply on his claim, was fraudulent, as against attaching creditors, whose claims antedated the assignment.—LENNON v. PARKER, R. I., 46 Atl. Rep. 44.

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS — Validity.—The right of a debtor to make a common law assignment for the benefit of creditors will be regarded as existing in each of the States of the Union, unless shown to be expressly prohibited.—J. WALTER THOMPSON CO. v. WHITEHEAD, Ill., 56 N. E. Rep. 1106.

7. ATTORNEY AND CLIENT—Right of Plaintiff to Discharge.—As plaintiff had the right to discharge her attorneys, though they had brought the action for her under her contract for a contingent fee, they cannot complain of an order substituting the names of other attorneys on the record as counsel for plaintiff in the further prosecution of the case, as this cannot prejudice their rights growing out of the contract and the alleged breach thereof.—ROOT v. MCILVAINE, Ky., 56 S. W. Rep. 498.

8. BANKRUPTCY — Assets — Endowment Policy.—Where an endowment policy of life insurance was made payable to the wife of the assured if he died during the term, or to himself if living at the expiration of the stipulated period, and was issued upon their joint application, and for several years before the bankruptcy of the husband the wife saved the policy from lapsing by paying the premiums out of her own money, held, that the bankrupt's interest in the surrender value of the policy, upon passing to his trustee, was subject to an equitable lien or right in the wife to be reimbursed for such proportion of the premiums paid by her as had gone to keep the policy alive for the benefit of the husband's interest.—IN RE DIACK, U. S. D. C., S. D. (N. Y.), 100 Fed. Rep. 770.

9. BANKRUPTCY—Exemptions—Personal Property.—Where the law of the State (Const. S. Car. art. 3, § 28) grants an exemption of personal property of the value of $500 to the head of a family, and provides that, if he has not that amount of property, his wife, having a separate estate, shall be entitled to the like exemption as provided for the head of the family, but with a proviso that not more than $500 of personal property shall be allowed to the husband and wife jointly, a married woman, having a separate estate, who becomes bankrupt, and whose husband owns personal property of

the value of $150, is entitled to claim only $350 as the personal property exemption to be set apart to her in the bankruptcy proceedings.—IN RE MCCUTCHEN, U. S. D. C., E. D. (S. Car.), 100 Fed. Rep. 779.

10. BANKRUPTCY — Partnership Assets — Fraudulent Preference.—The purpose of the bankruptcy act with reference to the joint assets of a bankrupt partnership is that they shall be first applied, in good faith, to the payment of partnership debts; and any scheme or device resorted to by persons contemplating bankruptcy for the purpose of charging partnership assets with individual debts is in violation of the act, and will be frustrated by the court, the law being administered in such manner as to prevent preferences, and secure the equitable distribution of the estate.—IN RE JONES, U. S. D. C., E. D. (Mo.), 100 Fed. Rep. 781.

11. BANKRUPTCY — Preferences.—A mortgage or assignment of property by an insolvent debtor to one of his creditors, intended to prefer that creditor over others, but executed before the enactment of the bankruptcy law, is not void under that statute or at common law; and, if such a transfer is not contrary to the statutes of the State, or is not annulled by proceedings taken under a State law within the time limited thereby, the property cannot be recovered from the creditor by the trustee in bankruptcy of the mortgagor or grantor.—IN RE TERRILL, U. S. D. C., D. (Vt.), 100 Fed. Rep. 778.

12. BANKRUPTCY—Property Fraudulently Conveyed. —A debtor mortgaged his stock in trade to a relative, and the mortgage was immediately foreclosed, and the goods bid in by a stranger, who transferred his bid to a friend of the debtor, and the latter ostensibly sold the property to the debtor's wife. The purchaser handed the purchase money to the wife, and she to the officer making the sale. It did not appear that the wife owned anything, but it was stated that the money was advanced to her on the credit of the debtor himself, and that he had repaid it. The debtor continued to carry on business in his own name as "agent," and the property was in his possession at the time he was adjudged bankrupt. Held, that the transfer to the wife was merely colorable, and in fraud of creditors, and the trustee in bankruptcy should be directed to take possession of the property as assets of the estate. —IN RE SMITH, U. S. D. C., S. D. (Ga.), 100 Fed. Rep. 795.

13. BANKRUPTCY — Revocation of Discharge.—Under Bankr. Act 1898, § 15, providing that a discharge in bankruptcy may be revoked "if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge," it is cause for revoking a discharge that the bankrupt had considerable property at the time of his bankruptcy and of his application for discharge, and concealed the same, showing no assets on his verified schedule, and swearing that he had surrendered all his property and had fully complied with all the requirements of the act, when the creditors, without laches, did not learn the facts until after the discharge was granted, and their petition is filed in due time.—IN RE MEYERS, U. S. D. C., S. D. (N. Y.), 100 Fed. Rep. 775.

14. BENEFICIAL ASSOCIATIONS—Beneficiaries.—Under Act June 22, 1893, relating to beneficial associations, and providing that payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband, or affianced wife of, or to persons dependent upon, the member, and that such benefits shall not be willed, assigned, or otherwise transferred to any other person, the death benefit of a member of such an association cannot be bequeathed by will to a niece of the member's deceased wife.—BALDWIN V. BEGLEY, Ill., 56 N. E. Rep. 1065.

15. BILLS AND NOTES—Defenses—Consideration.—If a person has a right at law, his forbearance to institute proceedings to protect or enforce it is a valuable consideration for a promise to pay.—MINNEAPOLIS LAND CO. V. MCMILLAN, Minn., 82 N. W. Rep. 591.

16. BILLS AND NOTES—Note Void Upon Payee's Death.—A note executed by son to father for various articles of personal property named therein, payable one day after date, but reciting that, if it is not paid during the payee's life, "this note is void or not attempted to be collected," became void upon the father's death, though an action by the father thereon was pending when he died.—MCGLASSON V. MCGLASSON'S EXR., Ky., 56 S. W. Rep. 510.

17. BILLS AND NOTES—Payee—Descriptio Personæ.—The addition of the word "trustee," following the name of a payee in a note, does not destroy its negotiability, as such word is *descriptio personæ*.—CENTRAL STATE BANK V. SPURLIN, Iowa, 82 N. W. Rep. 493.

18. BILLS AND NOTES—Want of Consideration.—Notes which were executed by defendants in consideration that a certain proceeding brought by other parties to remove the plaintiff as executor of an estate should be dismissed, and that the plaintiff should be allowed certain sums as commissions, attorney's fees, and clerk hire, were unenforceable for want of consideration, since the suit dismissed was not between the signers and the payee of the notes, and the commissions, attorney's fees, and clerk hire allowed in administering an estate must be determined by the county court.—CURRIER V. CLARK, Colo., 60 Pac. Rep. 958.

19. BILLS AND NOTES—Wrongful Possession.—Plaintiff alleged that a note executed by her brother-in-law in favor of her husband was placed in the hands of K as security for a loan to her husband, and while so pledged her husband assigned it to her, of which assignment she informed her brother-in-law on January 14th; that on January 16th her brother-in-law and the other defendants wrongfully obtained the note from K, and, while her husband was in a state of intoxication, persuaded him to assign it to one of the defendants. Held, that the complaint stated a cause of action to recover the note, and a demurrer thereto was properly overruled.—MORE V. FINGER, Cal., 60 Pac. Rep. 983.

20. CANCELLATION OF MORTGAGE—Proof of Title.—Where plaintiff filed a suit to set aside a mortgage as fraudulent and the defendant filed a a cross bill for the foreclosure of the mortgage, it was not incumbent on the plaintiff to trace his title back to the government, since both parties claimed title through a common grantor.—ANDERSON V. CARTER, Iowa, 82 N. W. Rep. 482.

21. CARRIERS OF PASSENGERS—Presumption of Negligence.—The overturning of a car, resulting in injury to a passenger, raises a presumption of negligence, which the carrier must overcome by proof, in order to escape liability.—FELTON V. HOLBROOK, Ky., 56 S. W. Rep. 506.

22. CONSTITUTIONAL LAW—Corporations—Revocation of Corporate Charter.—Const. 1831, art. 2, § 17, authorizes the legislature to incorporate "with a reserved power of revocation by the legislature." Held, that such provision became a part of the charter of corporations subsequently formed, and that the legislature might exert that power at any time.—WILMINGTON CITY RY. CO. V. WILMINGTON & B. S. RY. CO., Del., 46 Atl. Rep. 12.

23. CONTRACTS—Agreement Between Joint Owners.—Coupon bonds executed by the trustee, and secured by a mortgage on the trust property, executed by him, may be acquired and held by the parties to the agreement, not being their individual obligations, and they may enforce payment by a sale of the joint property.—COCHRAN V. JACKMAN, Ky., 56 S. W. Rep. 507.

24. CONVERSION—Evidence.—An action for conversion will lie where a mortgagee who has taken property into his custody for the purpose of foreclosing a chattel mortgage refuses to restore possession to a mortgagor who has made redemption in accordance with the provisions of Gen. St. 1894, § 4137.—LATUSEK V. DAVIES, Minn., 82 N. W. Rep. 585.

25. CORPORATIONS—Action by Creditor.—A creditor of a corporation, under sections 3237, 3239, Rev. St., if, looking to the interests of its creditors, the ends of justice require or the court direct, may maintain an action in equity to redress wrongs to such corporation growing out of the misconduct of its officers, resulting in loss or waste of the corporate assets.—KILLEN V. STATE BANK OF MANITOWOC, Wis., 82 N. W. Rep. 596.

26. CORPORATIONS—Estoppel to Deny Corporate Existence.—The purchase of goods from a corporation, and the execution of a note to the corporation, as such, for the payment thereof, will estop the maker of the note, in an action thereon, from denying the existence of the corporation.—FIRST CONGREGATIONAL CHURCH OF CRIPPLE CREEK V. GRAND RAPIDS SCHOOL FURNITURE CO., Colo., 60 Pac. Rep. 948.

27. CORPORATIONS—Forfeiture and Sale of Stock—Quo Warranto.—While a *quo warranto* proceeding might test the right of so-called directors to hold their office, it would be of little avail to restore to plaintiff stock illegally sold; and although a court of equity will not assume jurisdiction to remove an officer of a corporation, or declare a forfeiture of his office, yet when the court has jurisdiction for one purpose, and the right and authority of certain persons, as officers, collaterally appear, it will inquire into and determine such questions.—SCHWAB V. FRISCO MIN. & MILL. CO., Utah, 60 Pac. Rep. 940.

28. CORPORATIONS—Notice—Knowledge of Officer.—A bank is not chargeable with notice of the misappropriation of money by its cashier, acting as agent for a third party, in his individual capacity, although the cashier was in fact sole manager of the bank, and the money was, in the first instance, deposited to its credit with a correspondent, when it was immediately transferred on the books to the credit of the cashier, and checked out by him; nor is it liable to the principal for such money, when it realized no benefit therefrom.—SCHOOL DIST. OF CITY OF SEDALIA, MO., V. DE WEESE, U. S. C. C., C. D. (Mo.), 100 Fed. Rep. 705.

29. CORPORATIONS — Transfer of Property.—W, on whom were conferred, and who exercised as general manager of a corporation, powers of the fullest and most ample character, having bought chattels for it, paying $500 cash, and giving a note of $4,500 for balance, surrendered the chattels and received back the note, which it was unable to pay. This was done in good faith and for the best interests of the corporation, and was acquiesced in by its officials. The articles did not constitute all the assets of the corporation. Held that, though there was no vote of the stockholders authorizing the transaction, the assignee of the corporation could not repudiate the agreement and recover the property without restoring the consideration.—PENNSYLVANIA OIL CO. V. PURE OIL CO., Penn., 46 Atl. Rep. 3.

30. CRIMINAL EVIDENCE — Confession—Voluntary.—Where defendant, a dull negro boy, while in jail charged with burglary, was told by one who had been his employer for two years that he had better tell all about it; that, if he did not, it would be worse for him, but, if he would turn State's evidence, the court would give him a light sentence; and no warning was given defendant that his confession should be voluntary, and he confessed, it was error to admit evidence of such confession, since it could not be regarded as voluntary.—HAMILTON V. STATE, Miss., 27 South. Rep. 606.

31. DEEDS—Delivery—Presumptions.—A deed made by a father and mother to their infant daughter was, on the date of its execution, placed by the former in the child's lap, the mother taking the instrument to hold for the benefit of the daughter. The father testified that it was the intention of the parties that delivery to the mother should constitute delivery to the child. Held a sufficient delivery.—HALL V. CARDELL, Iowa, 82 N. W. Rep. 503.

32. DEPARTURE—False Imprisonment.—A petition alleging that defendant unlawfully "and without probable cause" procured the arrest and imprisonment of plaintiff stated a cause of action for false imprisonment, and not for malicious prosecution; and plaintiff, by striking out the words "without probable cause," did not change the cause of action.—REYNOLDS V. PRICE, Ky., 56 S. W. Rep. 501.

33. EASEMENTS—Light and Air—Obstruction.—A lot owner, by maliciously erecting on his lot a high fence, did not give a right of action to an adjoining lot owner, whose view was thereby obstructed, and from whose premises light and air were cut off.—SADDLER V. ALEXANDER, Ky., 56 S. W. Rep. 518.

34. EJECTMENT—Equitable Defense.—Since equitable defenses are not permitted in actions at law in the courts of the United States, an equitable title to land cannot be interposed as a defense to an action of ejectment.—DANIEL V. FELT, U. S. C. C., E. D. (N. Car.), 100 Fed. Rep. 727.

35. EJECTMENT—Possession Under Contract to Convey.—Where a railroad company takes possession of land under a written contract by the owner to convey on the completion of its railroad, and it and its successors, including defendant, occupy the land and operate a railroad thereon continuously up to the time of bringing ejectment by such owner's grantee, such action cannot be maintained, as defendant's possession was lawful.—WAGGONER V. WABASH R. CO., Ill., 56 N. E. Rep. 1050.

36. EQUITY—Cancellation of Instruments—Fraud.—A creditor, having been fraudulently induced to transfer to another his debtor's duebills, may maintain a bill in equity for a surrender thereof, though such other is solvent, and an action at law might be maintained against him for fraud; the remedy not being as adequate as in equity.—BENSON V. KELLER, Oreg., 60 Pac. Rep. 918.

37. EQUITY—Verdict of Jury.—In a case of purely equitable cognizance, where the chancellor, in the exercise of his discretion, directs an issue of fact to be tried by a jury, the verdict of the jury is not conclusive; but it is entitled to considerable weight, and, when confirmed by the chancellor, will not be disregarded on appeal, unless clearly against the preponderance of the evidence.—FORD V. ELLIS, Ky., 56 S. W. Rep. 512.

38. EVIDENCE—Documents—Failure to Affix Stamps.—The United States internal revenue law of 1898, requiring stamps to be affixed to certain documents, affects their use as evidence only in United States courts.—CASSIDY V. ST. GERMAIN, R. I., 46 Atl. Rep. 35.

39. EXECUTION SALE—Notice.—Where an execution sale of real estate was made without advertising it for a sufficient length of time, the sale was not void but only voidable, and could not be attacked in an action of trespass to try title, as a voidable deed cannot be set aside in a collateral proceeding.—SMITH V. OLSON, Tex., 56 S. W. Rep. 568.

40. EXECUTION—Sale of Homestead.—The fact that an execution defendant surrendered his homestead, of less value than $1,000, to be sold under execution, does not render the sale valid.—MEADE V. WRIGHT, Ky., 56 S. W. Rep. 523.

41. FEDERAL COURTS—Presumption—Stockholder in Corporation.—The rule that the stockholders of a corporation will be conclusively presumed to be citizens of the State in which it is incorporated, for the purpose of fixing the citizenship of the corporation for jurisdictional purposes in the federal courts, does not extend beyond such purpose, and there is no presumption that an individual who sues a corporation is a citizen of the same State, because he is a stockholder in such corporation.—HANCHETT V. BLAIR, U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 817.

42. FEDERAL COURTS—Jurisdiction—Diversity of Citizenship.—To a suit by a mortgagee of a street railroad company to enjoin another street railroad company from condemning the right to use a portion of the mortgagor's track, the mortgagor company is an indispensable party, and, as its interests necessarily

range it on the side of the complainant, it will be so placed by the court for jurisdictional purposes, although it is made a defendant by the pleadings; and, where it is a corporation of the same State as its co-defendant, a federal court is without jurisdiction on the ground of diversity of citizenship.—OLD COLONY TRUST CO. v. ATLANTA RY. CO., U. S. C. C., N. D. (Ga.), 100 Fed. Rep. 799.

43. FRAUDS, STATUTE OF—Debt of Third Person.—An agreement to forbear suit against the original debtor at the request of a third person to answer for the debt is a collateral promise, and is within the statute of frauds, and void, unless in writing.—GILLES v. MAHONY, Minn., 82 N. W. Rep. 583.

44. FRAUDULENT CONVEYANCE—Liability of Grantee.—G, an insolvent, having given an absolute bill of sale of all his property, consisting of a stock in trade, to B, for the purpose of hindering creditors, with a secret understanding that it was to secure B's claim, amounting to one-third the value of the property, and that G should be retained as manager, and thus obtain a benefit, and there having been no change of possession, and no evidence thereof, except that B's name was put up in the store as successor to G, the conveyance is fraudulent as to creditors.—BEST v. FULLER & FULLER CO., Ill., 56 N. E. Rep. 1077.

45. GAMBLING CONTRACT—Undertaking to Indemnify Stakeholder.—Under Comp. Laws, § 6602, providing that all trials of speed for reward are common nuisances, and that any person interested in any bet, stake or reward, is guilty of a misdemeanor, an undertaking to indemnify a stakeholder against liability for the surrender of the stakes to one of the parties to a bet on a horse race cannot be enforced against the principal by one of the sureties, who has paid the amount of the indemnity.—FERGUSON v. YUNT, S. Dak., 82 N. W. Rep. 509.

46. GAMING—Wager—Rescission.—Notice by one of the parties to a wager on the result of the election, to the stakeholder, before he had paid over the money, not to pay it to the other party, because the result of the election was in doubt, and stating that he would hold him personally responsible for the amount of the wager, does not constitute such a repudiation and rescission of the wager agreement, and the authority of the stakeholder, before performance, as will support an action to charge the stakeholder with the amount deposited with him by plaintiff, and by the former paid over to the other party to the wager.—MAHER v. VAN HORN, Colo., 60 Pac. Rep. 949.

47. HUSBAND AND WIFE—Agency.—A wife becomes her husband's agent by necessity to procure board and lodging for herself and minor children on his credit, where he drives her away without means of subsistence, and sues her for a divorce.—EAST v. KING, Miss., 27 South. Rep. 608.

48. INTOXICATING LIQUORS — Illegal Sale—Landlord and Tenant.—Gen. Laws, ch. 102, § 7, forbids a licensed liquor dealer from selling liquors to an unlicensed dealer, where he has reason to believe that the same are to be resold, and section 61 declares that no action shall be maintained for liquors so sold. Defendant, sued for rent, pleaded that the premises had been hired for the illegal sale of liquors, which he was to buy of plaintiff, who was to protect him in such selling, and furnish bail if arrested. Held, that the refusal to charge that, if plaintiff knew that defendant was selling liquors on the premises, and furnished him with liquor there, knowing he was to sell it illegally, plaintiff could not recover, was error.—GORMAN v. KEOUGH, R. I., 46 Atl. Rep. 37.

49. JUDGMENT—Parties not Made Defendants.—It is not permissible to bind new parties by a judgment previously entered against other defendants in a former proceeding, under section 5436, Gen. St. 1894, unless they were originally named as parties to the action in which the judgment was entered; such provision being applicable only to cases where parties jointly liable, and subsequently proceeded against, were named as defendants in the original suit.—INGWALDSON v. OLSON, Minn., 82 N. W. Rep. 579.

50. JUDGMENT — Assignment — Breach of Marriage Promise.—A judgment recovered in a breach of promise suit can be assigned.—STEWART v. LEE, N. H., 46 Atl. Rep. 31.

51. JUDICIAL NOTICE—Official Census.—Courts take judicial notice of the number of inhabitants of a city as shown by the official census taken pursuant to State or federal laws.—STRATTON v. CITY OF OREGON CITY, Oreg., 60 Pac. Rep. 905.

52. JUDICIAL SALES—Caveat Emptor.—As the rule of *caveat emptor* applies to judicial sales, a purchaser cannot have an abatement of the purchase price because of his failure to obtain title to a valuable spring on the tract of land purchased.—FOX v. MCGOODWIN'S ADM'R., Ky., 56 S. W. Rep. 515.

53. LANDLORD AND TENANT—Liability to Tenant.—A landlord, under a lease expressly exempting him from any obligation to the tenant to make repairs or improvements upon or about the leased premises during the life of the lease, is not liable to the tenant for damages to his goods occasioned by the leased premises becoming and remaining out of repair.—BENETEAU v. STUBLER, Minn., 82 N. W. Rep. 583.

54. LIFE INSURANCE—Construction of Policy—Warranty.—Where an application for life insurance recites that the answers and statements in this application "are warranted to be full, complete and true," and that, if they are not so, the policy issued thereon "shall be null and void," and also stipulates that the answers which it contains are parts of the policy, the policy and the application together constitute the written agreement of insurance, and both the insured and the beneficiary under the policy are bound by the warranty of the answers and statements in the application, although some of the questions and answers are of such a character as to preclude the idea that the parties intended to make them the subject of warranty.—HUBBARD v. MUTUAL RESERVE FUND LIFE ASSN., U. S. C. C. of App., First Circuit, 100 Fed. Rep. 719.

55. LIFE INSURANCE—Mutual Insurance—Interest.—Where a mutual benefit association failed to levy an assessment for the payment of a death loss as provided in a policy, interest should be allowed from the time of the breach.—CHRISTIE v. IOWA LIFE INS. CO., Iowa, 82 N. W. Rep. 499.

56. LIFE INSURANCE—Mutual Insurance—Policies.—Where a policy holder in a mutual fire insurance company cancels his policy, and afterwards pays several assessments for the payment of losses and expenses incurred during the time his policy was in force, he is not relieved from the payment of other assessments, necessary to cover such expenses and losses.—PEAKE v. YULE, Mich., 82 N. W. Rep. 514.

57. LIFE INSURANCE—Tontine Policy—Beneficiary.—Where a tontine life insurance policy was payable to the insured's executor, administrator, or assigns, and contained no provision for the designation of a beneficiary, no rights under such policy could be conferred on anyone by the insured, except by his assignment or a new contract; and a petition claiming such insurance, by virtue of a letter from the insured asking that the insurer make the insurance payable, in case of his death before maturity thereof, to plaintiff, on which the insurance company did not act, did not show a right of recovery.—ALVORD v. LUCKENBACH, Wis., 82 N. W. Rep. 535.

58. LIMITATIONS — Attorney's Fees — Employment.—Where an attorney was engaged to collect certain notes for plaintiff, and, after several trials and reversals, it was agreed to submit a part of the controversy to a referee, and six years later, in 1895, the matter was submitted as agreed, and the attorney represented the plaintiff before the referee, the trial court was not justified in holding, as a matter of law, that a claim for such services was barred by limita-

tions, since the question as to when the services of the attorney terminated was for the jury.—LOWE v. RING, Wis., 82 N. W. Rep. 571.

59. LIMITATION—Claim Against Estate—Discretion of Executor.—It is within the discretion of an executor to plead or waive the bar of the statute to a claim against his testator.—MALCOMSON v. WAPPOO MILLS, U. S. C. C., D. (S. Car.), 100 Fed. Rep. 805.

60. LIMITATION OF ACTIONS.—Where it is sought to avoid the bar of limitations because of a general admission of indebtedness, and such admission is proved, it must be taken to relate to the indebtedness in suit, in the absence of evidence that it referred to some other demand.—BLACKMORE v. NEALE, Colo., 60 Pac. Rep. 952.

61. MALICIOUS PROSECUTION — Probable Cause.—An instruction defining "probable cause" as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a "really cautious" man in the belief that the person so accused is guilty of the crime charged, was erroneous, since all that can be required is that one shall act as a man of "ordinary caution and prudence."—EGGETT v. ALLEN, Wis., 82 N. W. Rep. 556.

62. MASTER AND SERVANT—Duty of Employer to Furnish Safe Place to Work.—An employer being charged with the duty of exercising reasonable care in seeing that the place where an employee is set to work is reasonably safe, the employee has the right to rely upon the performance of that duty, and he is not required to make a critical examination of his surroundings at the place where he is set to work, to see if it is safe.—ROSS v. SHANLEY, Ill., 56 N. E. Rep. 1105.

63. MASTER AND SERVANT—Negligence—Fellow Servant.—Plaintiff, a common laborer, in the line of his duty, was at work for defendant putting a hose upon the tender of an engine, which was loaded with coal, and standing still. At the same time another servant was standing upon the loose coal on the tender to receive the hose from his fellow-servant on the ground, when a lump of coal was dislodged from the tender, and fell upon and injured the plaintiff. Held, upon a claim that defendant was negligent in overloading the engine with coal, and thereby responsible for plaintiff's injury, that its acts in this respect were not the proximate cause of the accident, and did not constitute actionable negligence for which a recovery can be had.—WEISEL v. EASTERN RY. CO. OF MINNESOTA, Minn., 82 N. W. Rep. 576.

64. MECHANICS' LIENS — Architect's Services — Contract.—Under Mechanic's Lien Law 1895, § 6, providing that any person who shall, by contract with the owner of a lot, perform services as an architect for the purpose of building on such lot, shall have a lien, etc., an architect, who furnished plans and specifications for a building, was entitled to a lien on the lot, though he did not superintend the construction of the building, since he performed services for the purpose of building thereon.—FREEMAN v. RINAKER, Ill., 56 N. W. Rep. 1055.

65. MUNICIPAL CORPORATIONS—Contracts — Effect of Illegal Provision.—The fact that a city, in a contract made with a water company for supplying water to the city and its inhabitants for a term of years, and fixing the rates to be charged and paid therefor, exceeded its powers by attempting to confer upon the water company an exclusive right to so furnish water, does not affect the validity of the other provisions of the contract, which are in no way dependent upon such illegal provision, and may be enforced, although that is rejected.—KIMBALL v. CITY OF CEDAR RAPIDS, U. S. C. C., N. D. (Iowa), 100 Fed. Rep. 802.

66. MUNICIPAL CORPORATION — Ordinance—Repeal by Implication.—An ordinance will not be construed as repealing a prior one on the same subject, unless there is an irreconcilable repugnancy between them, or the new ordinance is evidently intended to supersede all prior ones, and to comprise in itself the sole system of regulation on the subject.—PEOPLE v. HARRISON, Ill., 56 N. E. Rep. 1120.

67. MUNICIPAL CORPORATIONS—Ordinance—Improvement.—An ordinance providing for a street improvement, passed after the completion of such improvement, is void, and no assessment upon property can be made thereunder for the cost of the improvement.—CONNECTICUT MUT. LIFE INS. CO. v. CITY OF CHICAGO, Ill., 56 N. E. Rep. 1071.

68. MUNICIPAL CORPORATIONS — Personal Injuries—Notice.—Under Rev. St. § 1339, requiring notice to be given to a city of a claim for damages resulting from a defective sidewalk, a notice which states that an injury was caused by stepping into a hole in the sidewalk is not sufficient to support an action for an injury caused by a loose board in the walk turning and causing plaintiff's foot to slip into such hole.—GAGAN v. CITY OF JANESVILLE, Wis., 82 N. W. Rep. 558.

69. PARENT AND CHILD—Services — Compensation.—Domestic services performed by a daughter, of legal age, while a member of her father's household, will be presumed to have been performed voluntarily; and, in the absence of a prior agreement or understanding that she should receive compensation, a subsequent conveyance to her in consideration of such services is void as to creditors of the father.—MCCORD v. KNOWLTON, Minn., 82 N. W. Rep, 588.

70. PARTNERSHIP — Accounting.—Where plaintiff and defendant entered into a partnership as insurance agents, they were joint owners of the business during the continuance of the partnership; and defendant, having appropriated plaintiff's share of premiums collected, to which he was entitled, is liable to account to plaintiff for their value at the time of the conversion.—MORRILL v. WEEKS, N. H., 46 Atl. Rep. 32.

71. PENSIONS—Compensation—Contract.—A contract whereby the dependent mother of a deceased soldier employed her son-in-law to procure a pension for her, agreeing to pay him two-thirds of the amount she would receive, the application having been filed many years before, was void, being in violation of the pension law; and a settlement between the parties in which that illegal contract was taken into consideration will be disregarded.—CHRISTIE v. STEGER'S ADMR., Ky., 56 S. W. Rep. 521.

72. PHYSICIANS—License—Violation of Statute.—Ann. Code, § 1258, imposed a penalty for practicing as a physician without first having been examined by, and obtained license from, the State board of health. Plaintiff obtained from such board a temporary license to practice medicine, valid until the next succeeding meeting of the board for examining applicants, as authorized by section 3251. The temporary license expired, and thereafter, while without license, plaintiff rendered the services as physician for which he sued. Held, that such services were rendered in violation of such statute, and plaintiff could not recover therefor.—BOHN v. LOWRY, Miss., 27 South. Rep. 604.

73. PLEADING—Assignments.—The defendant, in an action on an account by the assignee thereof, cannot require the assignor to be made a party to the suit, as any defense against the assignor might be made against the assignee.—SHAMBAUGH v. CURRENT, Iowa, 82 N. W. Rep. 497.

74. PLEADING—Joint Liability—Misjoinder.—A count in a declaration which alleged a joint and common undertaking by the owner of a building, the supervising architect, and the contractors, to erect a building, and a joint and common hiring by them of a laborer, who was killed while working on a building, was not objectionable for misjoinder of parties.—COLE v. LIPPETT, R. I., 46 Atl. Rep. 43.

75. PLEDGE OF MORTGAGE — Bona Fide Purchaser.—Defendant executed a mortgage as security for certain bonds, which were intended for sale upon the market. When only a few of the bonds had been sold, plaintiff, who was trustee under the mortgage, made a loan to defendant for about one-half the amount of the mort-

gage, and took the bonds and mortgage as collateral security. Upon default in the payment of interest the bonds and mortgage were sold at public auction, and purchased by the trustee or mortgagee. Held, that the mortgagee was not a *bona fide* holder, in the sense of being in a position to insist upon the absolute provisions of the mortgage in respect to forfeiture, and while entitled to foreclose the mortgage, for the purpose of perfecting and realizing upon his securities, his security could not extend beyond the actual indebtedness, and the foreclosure would be for the benefit of both himself and the bondholders.—KNICKERBOCKER TRUST CO. v. PENACOOK MFG. CO., U. C. S. C., D. (N. H.), 100 Fed. Rep. 814.

76. PRINCIPAL AND SURETY—Bond — Application on Past Indebtedness.—When an insurance agent gave bond to an insurance company conditioned to pay all moneys that might be collected by him for the company, and the company credited a portion of moneys collected and remitted by the agent during the term of the bond on a prior indebtedness of the agent, it not appearing that the agent, ever directed such application, the sureties were not liable; the agent having remitted all moneys received by him during the term of the bond.—ROCKFORD INS. CO. v. ROGERS, Colo., 60 Pac. Rep. 956.

77. PRINCIPAL AND SURETY—Co-Sureties—Contribution.—Where the surviving co-surety on a bond defended an action brought to collect it, and thereby saved several hundred dollars, the estate of the deceased co-surety is liable to him for one-half of the counsel fees and costs incurred in such defense, since the defense was prudent, and the burden created by the joint undertaking should be equally borne by the co-sureties.—CONNOLLY v. DOLAN, R. I., 46 Atl. Rep. 86.

78. PROCESS—Foreign Corporations—Service.—Under Code Civ. Proc. Cal. § 411, which provides for service on foreign corporations "doing business and having a managing or business agent, cashier or secretary within this State," by service upon such agent, cashier, or secretary, a railroad company incorporated in another State, which, although having no line of road within the State, maintains an office therein, designated by a sign as the freight and passenger office of its road, in charge of a general agent, who solicits passengers and freight to go over its line, and issues bills of lading for freight so shipped, is subject to suit in the State; and such agent is a managing or business agent, within the statute, on whom service may be made.—DENVER & R. G. R. CO. v. ROLLER, U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 738.

79. PROCESS—Service—Default Judgments.—Where a judgment was taken by default, and the proof of service of process was an affidavit of one not an officer, and failed to state where the service was made, and no appearance was entered by the defendant, such judgment was rendered without jurisdiction, since personal service must be made within the State, and Rev. St. § 2891, requires proof of service before the taking of judgment by default.—ZIMMERMANN v. GERDES, Wis., 82 N. W. Rep. 532.

80. QUIETING TITLE—Lienholder.—Under Code, § 4223, providing that the action of quieting title of real property may be brought against any person "claiming title thereto," an action to quiet title can be maintained against a mere lienholder.—BLAIR v. HEMPHILL, Iowa, 82 N. W. Rep. 501.

81. RAILROAD COMPANY—Conveyances — Legitimate Railroad Purposes.—Where a deed to a railroad company conveyed land for all legitimate railroad, depot, and warehouse purposes, the grantor is not entitled to restrain the company and its lessees from maintaining a hotel and eating station thereon, reasonably necessary for the accommodation of its employees and passengers, though it was agreed at the execution of such deed that no hotel or eating house should be maintained thereon, since such hotel and eating station is a legitimate railroad purpose.—ABRAHAM v. OREGON & C. R. CO., Oreg., 60 Pac. Rep. 899.

82. RAILROAD COMPANY—Street Railways—Bicycle—Negligence.—Plaintiff was injured by a street car when attempting to cross the track on a bicycle. He was going at the rate of four to six miles an hour, and did not look for the car till he was on the track. If he had looked, he could have seen the car in time to have stopped or turned aside. Held, that the plaintiff could not recover for the negligence of the company in running the car at an excessive speed and not ringing the gong, as his own negligence contributed to the injury.—BENNETT v. DETROIT CITIZENS' ST. RY. CO., Mich., 82 N. W. Rep. 518.

83. REFORMATION OF INSTRUMENTS — Lease.—Equity will reform a lease which, by mistake, does not express the true agreement of the parties thereto.—GREEN v. DEMPSTER MILL MFG. CO., Iowa, 82 N. W. Rep. 485.

84. REMOVAL OF CAUSES—Contest of Will.—A proceeding for the probate of a will was instituted by the sole devisee therein in a probate of Arkansas, where the validity of the will was contested by the sole heir at law of the testator. From a judgment sustaining the validity of the will and admitting to probate the contestant appealed to the State circuit court. Under the constitution and statutes of the State, a circuit court has no jurisdiction to hear and determine a contest of a will except on an appeal from a probate court, in which case the matter shall be tried therein *de novo*. Held, that the proceeding in that court on appeal was not a "suit of a civil nature at law or in equity," within the meaning of the federal judiciary act of 1888, and was not removable by the contestant, who was a citizen of another State, to the circuit court of the United States, on the ground of local prejudice.—WAHL v. FRANZ, U. S. C. C. of App., Eighth Circuit, 100 Fed. Rep. 680.

85. REMOVAL OF CAUSES—Subject-Matter of Controversy.—An action based on Code Iowa, § 2423, which provides that all payments for intoxicating liquor sold in violation of that chapter shall be held to have been received in violation of law, and upon a valid promise to repay the same on demand, is one for the enforcement of a statutory penalty, which will not be entertained by a court of the United States, and is therefore not removable.—HAMILTON v. JOS. SCHLITZ BREWING CO., U. S. C. C., N. D. (Iowa), 100 Fed. Rep. 675.

86. SALES—Breach of Warranty.—Where defendant in an action on notes given for the price of a machine claimed damages for the breach of warranty, and a letter from him, given in evidence, showed that he allowed three months to elapse before giving the machine a trial, and the oral testimony showed that the trial was made promptly, and a notice given to plaintiff's agent that the machine did not work, it was proper to submit to the jury the question whether the trial was made in a reasonable time.—KEYSTONE MFG. CO. v. FORSYTH, Mich., 82 N. W. Rep. 521.

87. SALES—Contracts — Monopolies.—That the contract between a seller and manufacturer, giving the former the exclusive right to sell pianos in a certain territory, was illegal, constitutes no defense to an action by the seller to recover the price of a piano sold therein, since the sale of the piano was collateral to the seller's contract with the manufacturer.—HOUCK v. WRIGHT, Miss., 27 South. Rep. 616.

88. SALES—Damages—Fraudulent Representations.—The measure of damages recoverable in an action of tort by a purchaser against a seller for false and fraudulent representations inducing the sale is the actual loss sustained by the plaintiff by reason of the purchase, which is to be arrived at by adding to the price paid by plaintiff such outlay as is legitimately attributable to the wrong conduct of the defendant, from which is to be taken the fair actual value of the property received.—NASHUA SAV. BANK v. BURLINGTON ELECTRIC LIGHTING CO., U. S. C. C., S. D. (Iowa), 100 Fed. Rep. 673.

89. SALE—Rescission for Fraud—Consideration.—The general rule, that if a sale or agreement be made by

means of fraud, the injured party not being guilty of laches sufficient to estop him, may rescind the same and treat the agreement or sale as void upon condition of his restoring the wrongdoer to his former position, is subject to this exception, among others: If the defrauded person, by reason of the wrongful conduct of the wrongdoer, is rendered incapable of fully restoring the latter to his former position, to that extent such restoration is not necessary to a rescission of such sale or agreement.—GATES v. RAYMOND, Wis., 82 N. W. Rep. 530.

90. SALES—Sunday—Void Contract.—Where plaintiff's traveling salesman sold goods to defendant on Sunday, which were to be shipped to her from its place of business in another State, such contract, having been made on Sunday, being void under the statutes, plaintiff could not recover the price of the goods sold.—STROUSE v. LANCTOT, Miss., 27 South. Rep. 606.

91. STATE ASYLUMS—Actions Against.—A State institution for the care of the insane, which is created a corporate body with power to sue and be sued, may be sued for damages resulting from its wrongful diversion of the water of a stream from a lower owner.—BANK OF HOPKINSVILLE v. WESTERN KENTUCKY ASYLUM FOR THE INSANE, Ky., 56 S. W. Rep. 525.

92. TAXATION—Exemption—Title in United States.—So long as the United States retains the legal title to property it has sold to secure the payment of the purchase money, and any part of the same remains unpaid, the property is not subject to taxation by the State, and this rule is not affected by the fact that meantime the government retains the use of the property, and pays rent therefor to the purchaser.—UNITED STATES v. CITY OF MILWAUKEE, U. S. C. C., E. D. (Wis.), 100 Fed. Rep. 828.

93. TAXATION—Judicial Sales—Confirmation.—As the purchaser of land at judicial sale is not entitled to rents and profits before the confirmation of the sale, he is not liable for taxes assessed before that time under a city charter providing that the assessment may be made against "the owner or holder;" and therefore, though the property of a bank was exempt by statute from city taxation, land purchased by it at judicial sale was subject to a lien for city taxes assessed before the sale was confirmed, the assessment having been made before it became "the owner or holder" of the property.—GERMAN BANK v. CITY OF LOUISVILLE, Ky., 56 S. W. Rep. 504.

94. TELEGRAPH COMPANY—Messages—Statutory Penalties.—Code, § 4326, authorizing a recovery of a penalty against a telegraph company for transmitting a message incorrectly, does not authorize such recovery for delay in transmitting a message.—MARSHALL v. WESTERN UNION TEL. CO., Miss., 27 South. Rep. 614.

95. TELEGRAPH COMPANY — Negligence—Burden of Proof.—The delivery of a message by a telegraph company as sent from New York, instead of from New Orleans, where it was received by the company for transmission, is *prima facie* evidence of negligence, entitling the sender to damages, and casts the burden of proof upon the company to show that it was not negligent.—WESTERN UNION TEL. CO. v. TOBIN, Tex., 56 S. W. Rep. 567.

96. TELEGRAPH COMPANIES—Negligence—Mental Suffering.—A demurrer to a petition in an action for damages against a telegraph company was properly sustained where the only damage alleged was the mental and physical suffering of plaintiff's wife resulting from a failure to promptly deliver a message that their son, who had been seriously ill, was better.—MCCARTHY v. WESTERN UNION TEL. CO., Tex., 56 S. W. Rep. 568.

97. TELEGRAPH COMPANY — Telegram — Failure to Send.—A provision on the back of a telegram requiring notice to be given the telegraph company, within 60 days from the time a telegram is left with the company, of any damages arising from the failure to transmit or deliver it, is a reasonable regulation, with which the plaintiff must show either compliance, or an excuse for non-compliance, in order to recover.—CLEMENTS v. WESTERN UNION TEL. CO., Miss., 27 South. Rep. 603.

98. TENANCY IN COMMON—Partners.—Persons who have no other relation between them than that arising from their joint ownership in a vessel are not partners, but tenants in common therein. Where the tenants in common in a vessel are not partners, any of them may transfer his share at his pleasure, by bill of sale.—CROASDALE v. VON BOYNEBURK, Penn., 46 Atl. Rep. 6.

99. TENANCY IN COMMON—Statute of Limitations.—The fact that one tenant in common had possession and control of a piece of a land since 1868, made valuable improvements thereon, appropriated the rent, and paid the taxes, was not sufficient to bar the right of the widow and heirs of his co-tenant from asserting title to their interest in the land; since the possession of one tenant in common, in contemplation of law, is the possession of the other.—BLACKABY v. BLACKABY, Ill., 56 N. E. Rep. 1053.

100. TRUSTS — Insolvency of Cestui—Termination of Trust.—A will recited the insolvency of a son, and devised an estate in trust to provide for his support for life, with remainder to his issue; and a codicil provided that, if the son should be released from his debts by discharge from creditors or by force of bankruptcy, the trust should cease, and the trustee should convey the same to the son. Thereafter all the indebtedness of the son was paid, except such as was barred by limitations. Held, that the trust was terminated, and the son became entitled to a conveyance of the estate.—IN RE AMES, R. I., 46 Atl. Rep. 47.

101. VENUE — Change — Local Action.—Under Ann. Code, § 650, providing that actions of trespass on land must be brought in the county where the land lies, an action of trespass *quare clausum fregit*, brought in the district where the land lies cannot be removed by consent to another district of the county in which the action is brought.— WILKINSON v. JENKINS, Miss., 27 South. Rep. 611

102. WATERS—Appropriation—Percolating Waters.—Water intermingling with the ground, or flowing through it by filtration or percolation, or by chemical attraction is but a component part of the earth, has no characteristic of ownership distinct from the land itself, and the rules of laws applying to the appropriation of surface waters do not apply thereto.—WILLOW CREEK IRRIGATION CO. v. MICHAELSON, Utah, 60 Pac. Rep. 943.

103. WILLS—Beneficiaries.—Where a will gives a life estate to testator's son, with remainder to his children, with a provision that "in case he shall die, leaving no children, then all my estate shall go to my next of kin then living, share and share alike," nephews and nieces of testator living at the death of his son, who left no issue, take to the exclusion of nephews and nieces who died before them.—IN RE EVERITT'S ESTATE, Penn., 46 Atl. Rep. 1.

104. WILLS—Construction—Estates Created—Appeal.—A will provided: "Second. I give, devise and bequeath unto my wife, M C, the farm on which we now reside. Thirdly. All my personal property not otherwise disposed of, whilst she remains my widow." Held, that the limitation "whilst she remains my widow" applied to the farm as well as the personal property, since, unless the second and third clauses be read as one sentence, the third clause would be meaningless, and, when read as one sentence, the limitation applied to both.—ROSE v. HALE, Ill., 56 N. E. Rep. 1078.

105. WILLS—Trusts—Indefinite Beneficiaries.—Where a testator, after a life estate created in his wife, leaves his entire property to be invested in a fund for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ, a valid trust is created, as a trustee, to be appointed by the court, can select the beneficiaries from the class named.—HOOD v. DORER, Wis., 82 N. W. Rep. 546.